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THE UNIVERSITY OF ALBERTA

NEW TRENDS IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS

by

ALFREDO A. TOCCHI

A THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "New Trends in International Commercial Arbitration: A Comparative Analysis", submitted by Alfredo A. Tocchi in partial fulfilment of the requirements for the degree of Master of Laws.

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ABSTRACT

This study deals with the procedural aspects of modern international commercial arbitration.

After an introduction describing general concepts such as the definition of an arbitration agreement, the difference between ad hoc, institutional and UNCITRAL arbitrations, some explanatory information about the International Chamber of Commerce, the London Court of International Arbitration and the UNCITRAL arbitration rules is provided.

Chapter I is dedicated to an analysis of the arbitration agreement. Particular emphasis is placed on the elements that should be included in a well drafted arbitration clause.

Chapter II describes the arbitral procedure, from the composition of the arbitral tribunal, through the conduct of the arbitration, to the final award. Current issues such as the existence of a new law merchant (lex mercatoria) and the solution of disputes ex aequo et bono (or as amiable compositeurs) are briefly taken into account.

Chapter III studies the enforcement of arbitral awards. The New York Convention of 1958 is partially reproduced and examined. The relationship between arbitration and the ordinary courts is observed, stressing the relevance of the concepts of public policy and the currently debated detachment phenomenon.

Chapter IV is entitled New Trends in International Commercial Arbitration. A close look at the UNCITRAL Model Law and at the laws of Italy, France, Switzerland and England on international commercial arbitration provides the reader with a comparative insight into the relevant legislation of possible places of arbitration, with their respective advantages and disadvantages.

In the Conclusion, some personal thoughts on the problems affecting international commercial arbitration are submitted.

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INTRODUCTION

International commercial arbitration, defined as commercial to distinguish it from arbitration between subjects of public international law, has been recognized worldwide as the most effective method for the settlement of disputes arising out of transnational contracts.[1]

Arbitration in general is a device whereby the settlement of a question which is of interest to two or more parties, is entrusted to one or more persons, forming an arbitral tribunal, who derive their powers from the agreement of the parties and who are to proceed and decide the case on the basis of such an agreement.[2]

National legal systems classify a commercial arbitration as international according to two basic criteria, applied alone or in conjunction:

1) a commercial arbitration is international when its object affects interests of international commerce;[3]
2) a commmercial arbitration is international when the parties to it are citizens or residents of different countries.[4]

The non-existence of a neutral international court for private-law disputes has increased enormously the

number of contracts containing arbitration agreements. International commercial arbitration developed as an alternative to dispute resolution in national judicial systems although national judicial systems are essential instruments for the enforcement of arbitral awards.

The advantages of international commercial arbitration are manifold, among them:

1) the parties can choose language, dates, sites and modalities of the proceedings;
2) the arbitration process is not subject to any form of undesirable publicity;
3) the procedure is less formal;
4) the case is decided by an expert in the particular field of the controversy;
5) the award is given more quickly than a judicial decision and it is not subject to appeal;
6) it can be easier to obtain the enforcement of a foreign arbitral award than of a foreign judgment.

The cost of an arbitration depends on the kind of procedure chosen by the parties, so it would not be correct to say a priori that arbitration is cheaper than litigation.

Unfortunately, these advantages are sometimes annihilated by the drafting of unclear arbitration agreements.

An arbitration agreement is defined as:

> . . . an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement (UNCITRAL Model Law, Art. 7(2)).

Although there are a few exceptions, the arbitration agreement must be in writing. However, the agreement to arbitrate does not have to be signed.[5]

> . . . An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract (UNCITRAL Model Law, Art 7(2)).

Similar provisions can be found in many national laws on international commercial arbitration.

AD HOC, UNCITRAL AND INSTITUTIONAL ARBITRATIONS

Arbitration agreements can be very vague; the written provision "Disputes to be settled by arbitration" would be an arbitration agreement under English law.[6] Obviously, the situation is often quite different.

Arbitration agreements should be divided into three categories according to the kind of arbitration they refer to: ad hoc, UNCITRAL and institutional arbitrations.[7]

> An ad hoc arbitration is one conducted pursuant to an agreement which does not refer to an institution charged with setting up the arbitral tribunal and administering the proceedings, but it is rather intended to be self-executing.[8]

The absence of an institution organizing and supervising, under its rules, the development of the arbitration obliges the parties to clearly and unequivocally decide in advance all the details of the resolution by arbitration of an eventual dispute. That is why many ad hoc clauses are extremely long and complicated. This complexity often creates misunderstandings and problems of interpretation (especially if a party has an interest in delay), therefore nullifying many of the advantages of arbitration. Many practitioners strongly advise against ad hoc arbitrations.[9] However, since 1976 (UNCITRAL Arbitration Rules), international traders have had the option to choose an ad hoc form of arbitration governed by UNCITRAL Arbitration Rules. With the stipulation of an arbitration agreement referring to UNCITRAL Rules, the parties are exempted from drafting byzantine clauses, although they should try to agree in advance on several details that would be solved by the appointed institution in an institutional arbitration.

It is also possible to refer to UNCITRAL Rules in an institutional arbitration.

> An institutional arbitration is one conducted pursuant to an agreement which does refer to an institution charged with setting up the arbitral

tribunal and administering the proceedings.[10]

THE INSTITUTIONS: International Chamber of Commerce, London Court of International Arbitration

The International Chamber of Commerce (ICC) is the most important private arbitral institution[11] in the field of international commercial arbitration both in terms of volume of cases and significance of disputes.

Its court of arbitration was created in 1919 and the first arbitration was decided in 1923. The seat of the ICC is Paris, but only one-third of ICC arbitrations are held in that city. During the 1980-1982 period, no less than 39 countries served as venues for ICC arbitrations.[12]

The official languages of correspondence of the ICC are French, English, German, Spanish and Portuguese. It is obvious that the main tasks of a good institution are to set up a system of rules governing every step of the arbitration and to choose good arbitrators. The ICC Rules, although not very recent (1975), are still effective in eliminating every unnecessary intervention of national ordinary courts.[13]

The ICC Court maintains a panel of arbitrators through its world-wide network of the national committees that constitute the International Chamber of Commerce. Arbitrators are not selected directly by the ICC Court, but are proposed by one of the various national committees. Nevertheless, the choice must be approved by the court in

Paris.

The main features of ICC arbitrations are:

Universality: the type of transnational commercial dispute that may be resolved by ICC arbitration is not limited by the nature of the parties' business, nor their nationality, nor by whether they are in the private or public sector.

Openness: lawyers from all over the world represent their clients directly, without having to resort to any specialized "ICC bar". Similarly, the parties may choose arbitrators whom they know and trust: no less than 60 nationalities were represented among the arbitrators appointed to ICC tribunals during the three-year period from 1980 to 1982.[14]

Institutional Supervision: awards rendered by ICC arbitrators are final, nevertheless they must be "scrutinized" and "approved" by the ICC Court. That is a peculiarity of ICC arbitrations, which is correctly defined as "supervised arbitration".[15] The ICC arbitration court supervises the proceeding from the very beginning, registering the request for arbitration, examining the existence of a prima facie agreement to arbitrate, sending documents to the parties, collecting the payment of deposits, appointing arbitrators or approving the appointment made by the parties, finally ruling on any case of challenge, choosing the place of arbitration, setting deadlines, fixing fees and costs, notifying the awards to the parties.[16]

Procedural Flexibility: How the arbitrators organize hearings, submission of proof, and presentation of arguments is largely left to their discretion provided always that they keep the arbitration confidential. The ICC Rules are brief, and express generalities. They impose neither a "continental" nor a "common-law" manner of conducting the proceedings; the parties, and failing them the arbitrators, are free to decide what fits the particular case.
Length of Proceedings: although the rules provide that arbitrators are to make their awards within six months of the signature of the Terms of Reference, extensions have become commonplace. During the 1980-1982 period, the average duration of an ICC arbitration has been estimated as eighteen months. The effectiveness of disputes' resolution under ICC arbitration is demonstrated by a simple statistic: 90% of all awards are complied with voluntarily.[17]

Unfortunately, "the costs of ICC arbitration are assessed in a manner that has given rise to controversy: both the administrative charge of the ICC and the fees of the arbitrators are calculated with reference to the amount in dispute. The ICC's administrative charge may seem excessive in large cases, particularly when the arbitration takes place far from Paris, and the tribunal appoints its own secretary to be paid by the parties. (If the dispute involved $1 million U.S., the administrative charge will be $14,500

and the arbitrator's fees will range from a minimum of $7,450 with a sole arbitrator to a maximum of $90,000 with three arbitrators."[18]

The ICC requires an immediate payment at the outset of an arbitration of an amount representing one-half of an estimate of the total costs and fees of the proceedings, the second half becoming due when the Terms of Reference have been finalized.

The ICC Court also acts as the appointing authority (i.e. the authority empowered by the parties to select the arbitral tribunal) in ad hoc or UNICTRAL arbitrations.

The London Court of International Arbitration was created in 1892. The seat of the LCIA is London, but like the ICC Court, the LCIA can administer arbitrations anywhere in the world. Nevertheless, unlike the ICC, if the parties have not stipulated another place of arbitration - and unless there is some reason why another venue should be chosen - the LCIA will select London as the place of arbitration.

The LCIA maintains a panel of international arbitrators including persons from a wide range of countries.

Although there are many similarities, LCIA arbitrations are substantially different from ICC ones. The LCIA does not scrutinize and approve the award. Then, the LCIA Rules provide that arbitrators are to be remunerated on the basis of time.

As of January, 1985, rates were estimated as falling within the range of £300-£1250 per day for meetings or hearings; and £60-£250 per hour for "other time spent on the arbitration." Time spent by the LCIA secretariat in the administration of the arbitration is charged at £50 per hour.[19]

LCIA arbitrators may order one of the parties to furnish security for the legal costs of its adversary. It is not clear whether LCIA arbitrations are cheaper than those of the ICC, but it probably depends on the kind of dispute.[20]

The LCIA provides arbitrations under UNCITRAL Rules and also acts as the appointing authority of arbitrators in ad hoc or UNCITRAL arbitrations.

UNCITRAL RULES

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules were adopted on December 15, 1976, by the General Assembly of the United Nations. The preparation of these Rules took a period of three years. "They were the result of an unusual partnership of a U.N. organization (UNCITRAL) and a private organization, the International Council for Commercial Arbitration (ICCA)."[21]

Professor Pieter Sanders served as an expert consultant to the UNCITRAL Secretariat, and his role was essential. His commentary states:

> The UNCITRAL Rules are designed for world-wide use. They are intended to be acceptable in both capitalist and socialist systems, in developed and developing countries and in common law as well as civil law jurisdictions.[22]

The universal acceptance of the Rules has contributed to the spread of international commercial arbitration throughout the world. However, "the 1990's will be the earliest time possible for a considered evaluation of the Rules and their contribution to international trade".[23]

The Rules were designed "to make life easier for parties desiring ad hoc clauses."[24] Nevertheless, arbitrations under UNCITRAL Rules represent a tertium genus.

> While arbitration under the UNCITRAL Arbitration Rules cannot be regarded as institutional, administered arbitration, the Rules provide for reliance in certain cases on a so-called 'appointing authority', and it may be expected that in most cases existing arbitral institutions will be designated as 'appointing authority', although the parties are free to designate other institutions or persons to perform this function. It was therefore deemed advisable not to refer to "ad hoc arbitration" in the title of the Rules, in order to avoid creating the mistaken impression that arbitral institutions were excluded from playing a role in arbitrations under the UNCITRAL Rules. On the contrary, it is expected that parties will often designate an arbitral institution to serve as the "appointing authority".[25]

Both the ICC and LCIA are willing to act as the appointing authority in arbitrations under UNCITRAL Rules. Although, "it is highly advisable that the parties designate the appointing authority at the same time as they conclude their arbitration agreement",[26] the Rules provide that, if the parties have not designated an appointing authority in

the arbitration agreement, and they cannot agree on one after a dispute has arisen, the Secretary-General of the Permanent Court of Arbitration at The Hague[27] will designate the appointing authority. The Secretary-General will act under request of either party.

It has been pointed out that "if the parties do not reach agreement amongst themselves on the designation of an appointing authority, this will undoubtedly cause considerable delay."[28]

Apart from that, "the UNCITRAL Rules are by and large perfectly acceptable."[29] As Sanders pointed out in 1977,

> They regulate, as far as possible, all kinds of incidents which may come up in an international commercial arbitration. The Rules, in their 41 Articles, aim at a complete regulation of the arbitration.[30]

Provisions of the UNCITRAL Rules, ICC Rules, LCIA Rules and UNCITRAL Model Law are reported within this work, in order to give the reader a comparative reference.

Chapter I

THE ARBITRATION CLAUSE

> All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.[31]
>
> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.[32]
>
> Any dispute or difference arising out or in connection with this contract shall be settled by arbitration . . . in accordance with the UNCITRAL Arbitration Rules in force at the date of this contract. The appointing authority shall be . . . and the language to be used in the arbitration shall be. . . .[33]

The inclusion in a transnational contract of a standard arbitration clause recommended by a prestigious institution such as the International Chamber of Commerce or the London Court of International Arbitration should not exempt the parties from inserting some other "occasionally useful" elements. However, it should be pointed out that:

> No universally ideal arbitration clause exists. The appropriateness of each of the elements of a clause depends upon the context of the transaction: the parties, the type of contracts, the laws that bear on performance, and the places where the award might be enforced.[34]

These occasionally useful elements generally include:

1) number of arbitrators and appointing authority;

2) language;

3) place of arbitration;

4) applicable laws (rules of procedure and law applicable to the merits of the dispute);

5) power of arbitrators;

6) waiver of appeal.[35]

NUMBER OF ARBITRATORS AND APPOINTING AUTHORITY

> Where the parties have not agreed upon the number of arbitrators the Court shall appoint a sole arbitrator, save where it appears to the court that the dispute is such as to warrant the appointment of three arbitrators. In such a case the parties shall each have a period of 15 days within which to nominate an arbitrator (ICC Rules, Art. 2(5)).
>
> A sole arbitrator will be appointed unless the parties have agreed otherwise, or unless the Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate (LCIA Rules, Art. 3(2)).
>
> If the parties have not previously agreed on the number of arbitrators (i.e., one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed (UNCITRAL Rules, Art. 5).
>
> The parties are free to determine the number of arbitrators.
> Failing such determination, the number of arbitrators shall be three (UNCITRAL Model Law, Art. 10).

These contrasting provisions are indicative of the fact that there is no universal consensus whether it is better to

have a sole arbitrator or a three-member tribunal. An arbitral tribunal formed by any other number of arbitrators is rare.

In the United Kingdom, a provision for arbitration by three arbitrators is uncommon. Yet the notion of a sole arbitrator is repugnant in many parts of the world.[36]

A sole arbitrator is usually cheaper and quicker than a three-member tribunal. On the other hand, when the controversy is of sufficient value and complexity, the presence of a party-appointed arbitrator can be seen by the parties as a warranty that their point of view will be fully upheld and understood. Although the arbitrators must be impartial, in some cases each party-appointed arbitrator identifies himself with the interests of the party who appointed him. This situation stretches the importance of the third arbitrator who is usually appointed by the two party-appointed ones.

Often arbitration agreements do not include any provision about the number or the modality of appointment of the arbitrator(s). If the parties fail to agree on the choice of the arbitrators, the intervention of an external authority becomes indispensable: in case of institutional arbitration, the institution itself will decide (LCIA Rules, Art. 3(2), 3(4), ICC Rules, Art. 2(3-4)). In case of arbitration pursuant to UNCITRAL Rules, an appointing authority will be designated by the

Secretary-General of the Permanent Court of Arbitration of The Hague (UNCITRAL Rules, Art. 6(2), 7(2)), a mechanism that raises some perplexities due to the inevitable delay that it creates.[37]

In many jurisdictions ordinary courts have the power to take the initiative in case of inaction of the parties. In others an ad hoc arbitration agreement is void:

a) if it does not contain provisions concerning the number of arbitrators and the modalities of appointment (Italy, France);

b) if it provides for an even number of arbitrators (Italy). In other countries an even number of arbitrators will be increased by one unit "ex officio" (France).[38]

Unless the contrary intention is expressed in the arbitration agreement, in any case, where there is a reference to three arbitrators, a majority award shall be binding. Nevertheless, there are some exceptions: in some countries a unanimous decision is required.[39]

LANGUAGE

To avoid the inevitable delays that a translation of all the legal documents involved would produce, it is often a good rule to choose as the language of the arbitration the language of the contract in dispute. This is the criterion used by the institutions (LCIA Rules, Art. 8(1); ICC Rules,

Art. 15(3)). It might seem obvious, but it is also important to choose as arbitrators those familiar with that language. In any case, translations are almost always involved because often the language of the contract is not the language of the country where the award will be enforced.

PLACE OF ARBITRATION

"As a general principle, it is suggested to indicate in the arbitration agreement the place of arbitration."[40] However, "It may be doubted whether it is a good thing to fix such a place in advance."[41] To discuss in theory whether it is better to choose the place of arbitration in advance or not is fruitless. As in many other cases, we have to distinguish between institutional, ad hoc and UNCITRAL arbitrations. Sometimes the parties choose as place of arbitration the place of residence of the arbitrator(s).

> It is not known, when an agreement to refer is made in what condition a dispute may arise nor is it known which persons will then appear as best qualified to settle the dispute.[42]

This is a good argument against ad hoc arbitrations in which the parties, to avoid disagreements and an almost certain impasse when a dispute eventually arises, have to agree on all the details of the future arbitration in advance, at a stage where they cannot foresee all the possible implications of the dispute. The reference to an institution or to UNCITRAL Rules solves all these problems.

Institutional provisions determine the place of arbitration where the parties cannot agree on one: "The place of arbitration shall be fixed by the court unless agreed upon by the parties" (ICC Rules, Art, 12). "The parties may choose the place of arbitration. Failing such a choice the place of arbitration shall be London unless the Tribunal determined in view of all circumstances of the case that another place is more appropriate" (LCIA Rules, Art. 7(1)). "Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal having regard to the circumstances of the arbitration" (UNCITRAL Rules, Art. 16).

The place of arbitration is important for several reasons. First of all, "arbitral settlement of business disputes traditionally has been subject to certain mandatory rules imposed by the country in which the arbitral proceedings are conducted."[43]

These rules vary from state to state, but usually concern matters such as how the appointment of arbitrators may be challenged, the types of disputes that must be decided by ordinary courts, the right to appeal, and the validity of the award. Secondly, the place where the arbitration is held is a decisive element in determining whether an arbitration is a national or a foreign one for the purposes of recognition and enforcement.

Thirdly, the New York Convention of 1958[44] is

applicable in some contracting countries only when the foreign award comes from an arbitration which has taken place in another contracting country (reciprocity reservation, Art. 1(3)). In spite of all these circumstances, the place of arbitration is often chosen independently of any legal consideration. The parties tend to choose a "neutral" country where it is convenient for them and the arbitrators to meet, or a location where some arbitration court has its seat.[45]

> Although some students of international arbitration have pointed out that an award rendered in country A may be effective in country B irrespective of the view of the award that may be taken by the courts of country A, . . . to the knowledge of the author there is only one case in which a national court has enforced an award which had been disavowed in the country where it had been rendered.[46]

This authoritative remark emphasizes the importance of respecting the mandatory provisions of the relevant laws of the place of arbitration. It can be derived from this that the arbitrators should have a certain degree of familiarity with the legal system of the place of arbitration (lex loci arbitri).

Some countries should be avoided because their arbitration law is unfavorable. In some jurisdictions mandatory rules direct almost every step of the arbitral proceeding, assimilating arbitration to judicial resolution of disputes in front of ordinary courts. If in doubt, it is always recommended to choose as the place of arbitration a

traditional situs where the legal system has a liberal stance towards arbitration.[47]

APPLICABLE LAWS (MANDATORY RULES, RULES OF PROCEDURE AND LAW APPLICABLE TO THE MERITS OF THE DISPUTE)

The importance of respecting the mandatory rules of the place of arbitration has been discussed. This problem will be further analyzed later on. At this point it is sufficient to affirm that it is theoretically possible to find three different sets of rules applied to the same arbitration:

1) the mandatory rules of the lex loci arbitri;

2) the rules of procedure;

3) the law applicable to the substance of the dispute.

A "choice of a law clause" (pactum de lege utenda) is usually included in arbitration agreements.

> By applying the law chosen by the parties, arbitrators are alleviated from the difficult task of determining applicable law and can give effect to the expectations of the parties.[48]

With a pactum de lege utenda the parties usually choose two very different systems: the rules of procedure and the law applicable to the merits of the dispute.[49]

RULES OF PROCEDURE

In institutional arbitrations, for the rules of procedure, the arbitrators apply the rules of the institution and any other set of rules determined by the arbitration

agreement:

> The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and where these Rules are silent, any rules which the parties (or failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration (ICC Rules, Art. 11).
>
> The parties may agree on the arbitral procedure, and are encouraged to do so. In the absence of procedural rules agreed by the parties or contained herein, the tribunal shall have the widest discretion allowed under such law as may be applicable to ensure the just, expeditious, economical, and final determination of the dispute (LCIA Rules, Art. 5(1-2)).
>
> Subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity of presenting his case (UNCITRAL Rules, Art. 15(1)).

Reading these articles of the institutional and the UNCITRAL Rules, one is tempted to say that the arbitrators enjoy broad freedom in determining the rules of procedure, with the only limitation of having to respect some very general principles of natural justice. The same impression is confirmed by an analysis of the UNCITRAL Model Law, Art. 19(1-2).

> Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the weight

of any evidence.

SUBSTANTIVE LAW

Parties and arbitrators enjoy broad freedom also in determining the law applicable to the substance of the dispute:

> The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate (ICC Rules, Art. 13(3)).
>
> Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:
> a) determine what are the rules of law governing or applicable to any contract, or arbitration agreement or issue between the parties (LCIA Rules, Art. 13(1)(a)).
>
> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such a designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers appropriate (UNCITRAL Rules, Art. 33(1))
>
> The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed unless otherwise expressed as directly referring to the substantive law of that state and not to its conflict of laws rules.
> Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (UNCITRAL Model Law, Art. 28(1-2)).

The theories about the applicable substantive law in international commercial arbitration are innumerable and

contrasting.[50] It is sustained that the doctrine of autonomy justifies the power of the parties to choose the applicable law. "One understands generally by party autonomy, the power of the parties to choose the law applicable in contractual matters."[51]

Although an express choice is common, the doctrine admits the possibility of an implied choice:

> Thus the use in a written contract of terminology exclusively comprehensible or drafted in accordance with the formal requirements of a particular legal system may be considered an implied choice of the relevant substantive law rules of that legal system.[52]

Instead of a national set of rules, the parties can select a non-national standard. The definition of "non-national standard" includes international law, and lex mercatoria.[53]

The parties can also give the arbitrators the power to decide as amiables compositeurs or ex aequo et bono. It must be noted that, "Arbitrators, in the majority of legal systems, are bound to decide in accordance with the law, at least when they have not been exempted from this duty by the parties' agreement".[54]

Also, the UNCITRAL Rules and Model Law are in accordance with this criterion:

> The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the tribunal procedure

permits such arbitration (UNCITRAL Rules, Art, 33(2)).

"The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so" (UNCITRAL Model Law, Art. 28(3)).

Two other issues need a brief examination: "freezing of the law" and "depeçage". Some authors admit the possibility of adding a stipulation in an arbitration agreement that refers to the legal system of a certain country "frozen" at a precise date. Thus no subsequent development or amendment is applied by the arbitrators in the solution of the dispute.

This clause, sometimes found in contracts between enterprises of developed and developing countries, safeguards one of the parties from unexpected changes in the political situation, and consequently of the applicable laws of the developing country.[55]

"Depeçage" is defined as the application of more than one legal system to the same contract: different sections of the contract can be submitted to different legal systems.

Although the French courts have allowed depeçage, it is better to follow the suggestion of a renowned author and "avoid the designation of multiple jurisdictions."[56]

POWER OF ARBITRATORS

The source of the powers of the arbitrators is the agreement between the parties. As already mentioned, the

parties can expressly give the arbitrator(s) the power to act as amiable compositeur or to decide the controversy ex aequo et bono. Usually no other provisions are included in the arbitration clause.[57]

WAIVER OF APPEAL

Institutional and UNCITRAL arbitrations are "final and binding". This is one of the reasons why businesspeople and traders rely on them for the solution of transnational disputes.

> The arbitral award shall be final. By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived the right to any form of appeal insofar as such waiver can validly be made (ICC Rules, Art. 24).
>
> By agreeing to arbitration under these rules, the parties undertake to carry out the award without delay, and waive the right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may be validly made. The awards shall be final and binding on the parties as from the date they are made (LCIA Rules, Art. 16(8)).
>
> The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay (UNCITRAL Rules, Art. 32(2)).

But what about ad hoc arbitrations? Park suggests that the parties stipulate a waiver of appeal in ad hoc arbitrations.[58] Paulsson states that waivers of appeal are not necessary in institutional arbitration.[59] From these affirmations, it is clear that an express waiver of appeal is recommended in ad hoc arbitration agreements.

The waiving of the right to appeal does not exclude the possibility that the award might be subject to judicial review either by the courts of the place of arbitration or by the courts of the country where the award has to be enforced.[60] The grounds for this judicial review depend on the national legislation.[61]

Chapter II

THE ARBITRAL PROCEDURE

The arbitral proceeding begins with a request for arbitration. In case of institutional arbitration, the notice of intention to arbitrate must contain some compulsory indications (Art. 3, ICC Rules; Art. 1 LCIA Rules; Art. 3 UNCITRAL Rules).

Four elements are in any case required:

1) names of the parties;

2) reference to the arbitration agreement;

3) nature of the dispute;

4) remedy expected.[62]

The demand for arbitration must be served on the opposite party and on the institution.

A claimant should make a substantial submission at the outset of the case. This submission, in case of institutional arbitration, will allow the institution to choose an appropriate arbitrator when there was no reference in the arbitration agreement.

If the institution determines that there is a *prima facie* agreement to arbitrate, an arbitral tribunal is formed.

INDEPENDENCE OF THE ARBITRATION CLAUSE

> An arbitration clause has been made in a contract. Is it to be regarded as independent of this contract, or is its validity affected if the existence or the validity of the principal contract is contested? . . . There is a clear tendency today, in a great number of countries, to consider that an arbitration clause is separate from the main contract in which it has been stipulated.[63]

The problem of the independence (or severability) of the arbitration agreement does not arise when instead of including an arbitration clause (clause compromissoire) into the main contract, the parties stipulated a separate agreement to arbitrate (compromis).

If in the case of a compromis it is clear that the arbitral tribunal has jurisdiction to decide on the existence or the validity of the main contract, the situation is different in the case of a clause compromissoire. In practice, many standard arbitration clauses expressly provide that the arbitrators have jurisdiction also over the existence and the validity of the main contract.[64]

In absence of any express provision, national laws and jurisprudence become essential to the determination of the problem.[65]

It should be noted that Art. 16(1) of the UNCITRAL Model Law states that, "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement".

The same concept is included in the ICC Rules (Art. 8),

LCIA Rules (Art. 14(1)) and UNCITRAL Rules (Art. 21).

This is in accordance with the new trend emerging in several countries.[66]

COMPOSITION OF THE ARBITRAL TRIBUNAL
- QUALIFICATIONS OF THE ARBITRATORS

In the choice of the arbitrators, the parties are not totally free. National laws and arbitration rules impose some limitations for different reasons.

In some countries foreigners are not allowed to be arbitrators. (This was the situation in Italy before 1983). In other countries foreigners can be arbitrators only if they are resident there.

In socialist countries, where arbitration is subject to severe controls by the government, the practical situation is that the lists of potential arbitrators do not include foreigners. In some Moslem countries the prohibition affects women.

Almost everywhere judges are forbidden to act as arbitrators. This is not the case in England, where, however, the qualifications required of an arbitrator for international arbitrations state that:

> In England it is necessary to become a member of the Institute of Arbitrators, to pass an examination under the control of the Institute, and a person cannot be included in a special list drawn up for international cases unless he has already been an arbitrator at least in ten cases concerned with domestic matters.[67]

In other countries the arbitrator must be a qualified

lawyer. In all cases arbitrators should be impartial and independent. Nevertheless the parties may agree to waive the requirement of the independence of their party-appointed arbitrator. "In the absence of such agreement a party is clearly not permitted to nominate as arbitrator its own lawyer, or an employee."[68]

The party-appointed arbitrator may be partisan, but not dishonest. It is an indisputable principle that the arbitrators must show, "objectivité et honnêteté dans leur comportement, comme dans leur jugement".[69] In fact, "In the United States a number of State laws allow for the setting aside of an award for partiality of an arbitrator when this arbitrator has been appointed as neutral, but not if he was a party-appointed arbitrator."[70]

It is obvious that the third arbitrator must be neutral. To assure his impartiality, in many jurisdictions he has to be of a nationality other than the one of the parties.

MODIFICATIONS TO THE ARBITRAL TRIBUNAL

Challenge of Arbitrators

In some countries, the same provisions applicable in challenging an ordinary judge, also apply to arbitrators.

However, if challenging a judge is usually rare, challenging an arbitrator is not uncommon. As a general principle, the arbitrator is under a duty to inform the

parties or any existing motive for disqualification.[71] Common grounds for challenge are:

1) prior or continuing financial interest or professional or subordinate relationship;

2) bias or previously expressed opinion;

3) nationality.

In case of institutional arbitration, "should an arbitrator be challenged by one of the parties, the Court (of the institution), as sole judge of the grounds of challenge, shall make a decision which shall be final" (ICC Rules, Art, 2(7)). Nevertheless, if an appeal in front of an ordinary Court:

> . . . remains possible due to mandatory provisions of law of the place of arbitration, the Court (of the institution) shall, subject to the provisions of the applicable law, decide whether the arbitral proceedings are to continue notwithstanding an appeal (see LCIA Rules, Art. 3(7) to 3(9)).

A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

The same rule is present in several national laws and in the UNCITRAL Rules and in the UNCITRAL Model Law:

> When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.
>
> An arbitrator may be challenged only if circumstances

> exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made (UNCITRAL Model Law, Art. 12(1-2)).

A party wishing to challenge an arbitrator must send notice of his challenge within a specified period of time (fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party, or within fifteen days after the discovery of any ground for challenge (Art 11(1) UNCITRAL Rules, Art. 3(8) LCIA Rules, Art. 13 UNCITRAL Model Law).

> A challenge, particularly a successful one, could seriously disrupt the proceedings. It is thus only reasonable that a relatively short fifteen day time-limit be provided by the rules, so as to have this disruptive process over with quickly and at the earliest possible stage of the arbitral proceedings.[72]

On the contrary, in arbitrations under ICC Rules, there is no express provision of any deadline for the right to challenge an arbitrator.

REPLACEMENT OF AN ARBITRATOR

Apart from challenge, an arbitrator may be replaced for four other reasons:

1) death;

2) de jure or de facto impossibility;

3) resignation;

4) misconduct.

If death and impossibility do not need any further analysis, it would be interesting to analyze the liability of the arbitrators toward the parties in case of resignation or misconduct. "All arbitrators are bound to fulfil their mission until it has been completed" (Art. 1462 N.C.P.C., France). Nevertheless, if they have a "good reason", in Italy they are permitted to abandon their mission. Under ICC Rules, an arbitrator is responsible for misconduct if he is "not fulfilling his functions in accordance with the Rules or within the prescribed time limits" (Art. 2(8)).

The ICC Court can use its ex officio powers to remove an arbitrator pursuant to Art. 2(8). The LCIA court has a similar power if an arbitrator, "acts in manifest violation of these rules, or does not conduct the proceedings with reasonable diligence" (Art. 3(6)), although the LCIA Court will act only ex parte or upon request by the remaining arbitrators.

When there is a three member tribunal, the replacement of an arbitrator does not require the repetition of the hearings, unless the tribunal decides otherwise.[73]

In all cases of replacement, the procedures for initial nomination or appointment will be performed again, but in arbitrations under LCIA Rules, "The Court shall have discretion to decide whether or not to follow the original

nominating process" (Art. 3(5)).

The legal relationship between parties and arbitrators is based on a contract (receptum arbitri).

"Acceptance of the office of arbitrator has the following effects:

a) It obligates the arbitrators to determine a case within a given time and makes them liable for damages in case they resign from their office.

b) It authorizes arbitrators to claim for remuneration."[74]

There is no doubt that an arbitrator is liable if he does not perform the duties imposed on him by the receptum arbitri.

The receptum arbitri is considered a "contract for services" ("prestazione d' opera intellettuale" under Italian law). The action tending to declare an arbitrator liable will therefore be an ordinary action in contract or in tort. A mere mistake made by the arbitrator even due to his negligence, is not enough to render him liable. There must be "gross negligence".[75]

The contractual relationship between parties and arbitrators is considered in several countries as equivalent to the relationship between client and lawyer.

TERMS OF REFERENCE

At the very beginning of the proceeding, under ICC Rules:

> The arbitrator shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document

defining his Terms of Reference.

This document shall include the following particulars:

a) the full names and description of the parties;

b) the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made;

c) a summary of the parties' respective claims;

d) definition of the issues to be determined;

e) the arbitrator's full name, description and address;

f) the place of arbitration;

g) particulars of the applicable procedural rules if such is the case, reference to the power and conferred upon the arbitrator to act as <u>amiable compositeur</u>;

h) such other particulars as may be required to make the arbitral award enforceable in law, or may be regarded as helpful by the court of arbitration or the arbitrator (ICC Rules, Art 13(1)).

The Terms of Reference, signed by the parties, will avoid eventual exceptions regarding competence of arbitrators, precise determination of the <u>petitum</u> and eventual security deposits.[76] Usually, it is not absolutely necessary for both parties to participate in the drafting of the Terms of Reference or to sign them, the Court or the arbitrators being empowered to draft such terms even against the will of one of the parties.[77]

> Frequently the terms of reference are finalized during the tribunal's first meeting with the parties. This occasion should be used to argue upon various procedural matters. As in a pre-trial conference in ordinary court cases, the parties may also be expected to provide realistic evaluation of the amount of time

> that their case will require, the number of witnesses they will present, the mode of exchanging documentary proof, the necessity of a site visit or technical expertise, and other related matters.[78]

The LCIA Rules do not require the drafting of the Terms of Reference. However, in some countries the drafting of them is compulsory.

APPLICABLE LAW

> Every arbitration is necessarily subject to the law of a given state. No private person has the right or the power to act on any level other than that of a municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently end in accordance with tradition be called the lex fori, though it would be more exact (but also less familiar) to speak of the lex arbitri or, in French la loi de l' arbitrage.[79]

The approach of municipal legislation to the problems concerning the different aspects of arbitral procedure is largely influenced by general principles of jurisprudence and by two general theories of international arbitration.

1) territorial principle;

2) doctrine of autonomy.

Territorial principle:

Any activity, including international commercial arbitration, taking place in the territory of a state, is subject to the laws in force in that territory.

Doctrine of autonomy:

If arbitration is to be regarded as the product of the free choice of the parties, who prefer to have their disputes

settled by private judges i.e. arbitrators, instead of by Courts of law, there is no reason to consider arbitration proceedings as necessarily linked with the law of the place where the seat of arbitration has been fixed.[80]

Any doctrinal discussion about the supremacy of either one of these theories is futile: every national legislation applies both. In fact we could draw a spectrum and notice that all the legal systems are somewhere between the extremes. On one side we find countries that recognize the autonomy of the parties to refer transnational disputes to arbitration, but submit the proceedings to most of the rules applicable by their ordinary courts.

On the other side, we find countries that submit international arbitrations taking place within their territory only to a few mandatory rules, leaving parties and arbitrators free to choose the rules of procedure and the law applicable to the merits of the controversy from other legal systems, or even detached from every national legal system, such as lex mercatoria, principles of international law or aequitas.

We find mandatory rules in every country, including those that are the most liberal toward arbitration, and, on the contrary, we find in every legal system, including the most "oppressive", recognition of the parties' autonomy.

A judgment upon the attractiveness of different national policies does not change the fact that only national

legislators are in the position to rule effectively in one direction or another.

However, international traders can always choose the place of arbitration. As already mentioned, a distinction is usually drawn between mandatory rules of the place of arbitation on the one hand, and rules of procedure and law applicable to the merits of the dispute, that are discretionary, on the other.

It is worth examining these mandatory rules, taking into account that it is only possible to individuate minimum requirements present in almost every country, while there are countries where mandatory rules govern the entire arbitral proceedings, leaving to the arbitrators no discretion at all.

MANDATORY RULES

"Commercial arbitration can become an important method in settling disputes outside the courts only if the law is expressly favorable to it."[81]

Today, twenty years after this statement was made, nobody denies the importance of international commercial arbitration, and the legislation of the most important trading states have reached an acceptable degree of harmonization in respect of arbitration.

That is the reason why it is possible to enumerate a group of rules present in almost every jurisdiction that must be, in any case, respected by parties and arbitrators.

A first group of rules affects the validity of the arbitration agreement which, in international commercial arbitration, must be in writing:

1) the parties must be legally capable;
2) the arbitration agreement must concern a defined legal relationship;
3) such relationship must concern a subject-matter capable of settlement by arbitration;

1) In order to enter into an arbitration agreement, the parties must be legally capable of doing so under their own national law.[82]

> Parties are allowed to submit to arbitration any right of which they are qualified to dispose, or in other formulas, parties must be qualified to enter into a contract, or to make promises, or to make settlements, or to sell, or they must not be under some disability under the law.[83]

Special problems arise in respect of public entities entering into arbitration agreements.[84] In practice, public entities do often enter into arbitration agreements. The international trend is to recognize that public entities acting jure privatorum (i.e., commercial activities) are subject to the jurisdiction of the courts in a foreign State.[85]

It may be derived that, when public entities enter into arbitration agreements, they implicitly subject themselves to the jurisdiction of the arbitrators. Besides: It

would be:

> . . . contrary to fundamental principles of good faith for a state party to an international contract, having freely accepted the arbitration clause, later to invoke its own legislation to contest the validity of its agreement to arbitrate.[86]

2) The subject-matter of the arbitration agreement must be clearly defined; a general agreement to arbitrate is not valid. "No law recognizes as legally binding an agreement by which parties undertake to submit to arbitration all kinds of differences which may arise between them in the future."[87] The submission is valid only if it contemplates disputes which may arise from a given contract.

3) "The subject-matter of the arbitration agreement must be one which is not reserved by the law as non-arbitrable or contrary to public policy."[88] Non-arbitrable matters vary from state to state. Also public policy (ordre public in French, ordine pubblico in Italian) varies from state to state, but we cannot overlook the fact that part of the doctrine has tried to define "l'ordre public international."[89]

Unfortunately, the meaning of ordre public international is not clear, as it will be explained later on.

A second group of mandatory rules concerns the arbitral

procedure.

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case" (UNCITRAL Model Law, Art. 18). The arbitrator must be disinterested and unbiased. He must decide the case on the basis of his/her own opinion, and not on that of another person.

The principle "audi alteram partem" does not prevent the arbitrator from arriving at an award where one of the parties does not appear. It must simply be indisputable that the defaulting party has been given due notice that there was an arbitral procedure and some reasonable time must have been left for him to lodge an appearance and prepare the case.[90]

It is clear that these general mandatory rules are accepted principles of jus naturalis, and they do not need any further examination within the scope of this work.

RULES OF PROCEDURE

As a general principle, the parties can choose the rules of procedure. The only exception is when the legislation of the place of arbitration imposes the observance of a determined procedure.

"When drafting the arbitration agreement or the Terms of Reference, is it opportune to state that a determined national procedural law applies?"[91]

Indeed, the formality imposed by respecting a national procedural law is often not suitable for international commercial arbitration. "The more freedom is allowed to the arbitrator, the better it is."[92]

The choice of a national law of procedure presents another inconvenience: if any of its provisions were overlooked, the award could be set aside.[93]

> While there are no statistics available, the authors would hazard a guess that the parties or arbitrators specifically choose an applicable national procedural law in only a small percentage of ICC cases. By declining to make an explicit adoption of national procedural norms, the arbitrators retain a maximum degree of discretion to adopt procedures which are consistent with the requirements of international commerce and which may differ from the procedures normally in force at the seat of arbitration.[94]

If it is true that in many cases parties and arbitrators do not choose a national set of rules of procedure, in some cases they do.

Ronald Bernstein dedicated five pages to the examination of the differences between the English and the Continental procedures,[95] and concluded that English rules of procedure are not suitable for international commercial arbitration.

The same conclusion is rendered by Paulsson[96] and by Craig, Park and Paulsson:

> The continental system of proof is characterized by the exchange of documents between the parties.
>
> Hearings serve principally as an occasion for arguments based on facts recorded in written evidence already submitted. The common-law system, on the other

> hand, uses hearings to develop facts and to introduce documents into evidence.
>
> The governing principles of the ICC Rules and the particularities of international disputes, where the parties and the arbitrators may be domiciled in different countries, favor the continental approach.[97]

The choice of the rules of procedure of the place of arbitration is often motivated by a practical reason: when the arbitrators apply the lex fori, it is usually easier to obtain the co-operation of the courts in that State.[98]

LAW APPLICABLE TO THE MERITS OF THE DISPUTE

> The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of the State and not to its conflict of laws rules.
>
> Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (Art. 28 (1-2) UNCITRAL Model Law).

The same principles are expressed in the ICC Rules (Art. 13(3)), LCIA Rules (Art. 13 (1-2)) and UNCITRAL Rules (Art. 33(1)).

No problem arises when the parties have designated (with an express or implied choice) the applicable law.[99]

All the doctrinal discussions of the past are irrelevant at the present time. The choice of the parties will be respected in almost every country. Failing any choice, the

arbitrators are sometimes in a critical position. The choice of the substantive law is of fundamental importance.

> Indeed, very often an arbitrator's decision is likely to be very different depending on which law he applies. This will be the case, to mention just a few examples, when he is called upon to determine the extent of the seller's liability for hidden defects, the effects of a set-off, the duration of the period of limitation, the validity of a guaranty or of a security interest or the bearing of the underlying transaction where the period of limitation for an action on a bill of exchange has expired.[100]

It is essential to note that a principle:

> . . . would seem to be generally accepted at present; arbitrators are not bound to follow the system of conflict of laws adopted in any particular country, and, contrary to a resolution made in 1957 by the Institute of International Law, they can in particular leave aside the rules of conflict of the country where the arbitration procedure takes place.[101]

In practice:

> The principal method used by ICC arbitrators to choose an appropriate conflict of laws rule is the cumulative application of the different rules of conflicts of the countries having a relation to the dispute. The approach is particularly satisfying to arbitrators when the different relevant conflict systems yield an identity of results.[102]

This situation might be defined as a false conflict of laws. The dilemma arises when the arbitrators find a true conflict of laws.[103]

In one ICC case, the arbitrator concluded that under "international conceptions of private law", the center of gravity of contractual relations was the place where a commercial agent exercised his activities; thus the law of that country should be applied.

In another case, the arbitrator applied "criteria of localization generally applied in private international law" in order to determine the jurisdiction with the closest connection to the transaction. Sometimes an arbitrator will expressly state that he:

> . . . does not deem it necessary to determine the applicable law according to any national system of conflict of laws, including those of the jurisdiction with the closest connection to the case; instead, he will determine the applicable law by the criteria of "objective socialization" as permitted under generally accepted choice of law rules.[104]

It must be noticed that, when (the parties or) the arbitrators choose a national substantive law, they should follow the current jurisprudence of interpretation developed in that jurisdiction.[105]

AMIABLES COMPOSITEURS, EX AEQUO ET BONO, AEQUITAS

An amiable compositeur is an arbitrator who decides the dispute ex aequo et bono.

Decisions ex aequo et bono or in aequitas are the same concept. The more the doctrine attempts to draw a distinction between amiables compositeurs and arbitrators deciding ex aequo et bono, the more it is hard to see any difference.

The same conclusion seems to be reached by Redfern and Hunter.[106] However, as pointed out by Craig, Park and Paulsson:

> The ICC Rules do not offer any translation of the term amiable compositeur in the English text of the

> Rules; nor do they attempt to make a comparison with the powers of arbitrators to decide ex aequo et bono, which is sometimes used at common law and is referred to in the UNCITRAL Rules.[107]

From this statement one could infer that the two concepts are somewhat different.

Nevertheless, from a definition of Park, it seems that no difference whatsoever exists:

> Amiable composition, literally translated as 'friendly compromise', should not be confused with conciliation or mediation. The award, rendered by an arbitrator acting as amiable compositeur, is binding on the parties. The arbitrator decides according to 'equitable principles' or ex aequo et bono. The arbitrator does not ignore the law, but rather refrains from applying the letter of the law if it conflicts with his own concept of fairness. The contract is not rewritten, but its terms may be adjusted.[108]

As Sanders pointed out in 1956, "In international commercial arbitration there is a good deal of misunderstanding about the character of the amiable compositeur. He is the great obstacle to all efforts of unification."[109] Another publicist has even proposed the abolition of the name of "amiable compositeur".[110]

The situation of uncertainty has not changed much today, in spite of the fact that many arbitration agreements empower the arbitrator to determine the dispute as an amiable compositeur. The features of the arbitrator as amiable compositeur are described by Nestor:

> a) il n'est pas obligé aux normes procédurales exigées par la loi;

b) il n'est pas tenu d' appliquer les normes du droit matériel, mais décide selon l'équité;

c) le prononcé est définitif.[111]

But the power of the amiable compositeur to disregard the law is subject to some limitations:

> The amiable compositeur as any other arbitrator must observe the fundamental rules which govern judicial procedure and material law. For instance, he is not allowed to base the opinion on secret information or on hearing of the witnesses in the absence of the other party or his representative. Witnesses or experts cannot be sworn by him when the legislation of the country where arbitration is held reserves the authorization to administer an oath to the public judge.[112]

The same is true for decisions ex aequo et bono:

> A clause giving the judge (or the arbitrator) power to decide ex aequo et bono does not confer on him unlimited freedom for his findings. If to a certain extent he may set aside the existing legal rules, still he is bound by the general principles of justice and by general accepted standards of international relations.[113]

However, it is the opinion of the author that any reference to fundamental rules or generally accepted standards of international relations is suspect. The meaning of these expressions is far from clear. To complicate things, Jakubowski writes that:

> The characteristic feature of amiable composition is omission of the law created by States, and recourse to principles of natural law and justice. These principles can be found in existing legal system as 'general principles of law recognized by civilized nations'.[114]

As Green writes, the distinction between civilized and uncivilized countries was abolished long ago and, moreover, it is almost impossible to define these "generally accepted

principles."[115]

In conclusion, the power to act as amiable composteur, or in aequitas, or ex aequo et bono, means that the arbitral tribunal, although it has to respect the mandatory rules of the place of arbitration (otherwise the award could be set aside), can take into consideration any possible set of rules (including national laws, principles of natural justice, trade usages and lex mercatoria) to arrive at an equitable solution of the dispute.[116]

A last observation: notwithstanding the statement of Park, the arbitrators acting as amiables-compositeurs have no power to rewrite the contract, nor to adapt its terms to the changed circumstances.[117] They may disregard, but not create. However, by appropriate wording an arbitration clause can be widened to confer upon the arbitrator powers that he would not have under the usual form of submission, e.g., power to vary a contract.[118]

The power to decide ex aequo et bono or as amiable compositeur is subject to a double limitation: First, the parties must have agreed upon the principle that arbitrators may so decide, and second, there must be no mandatory rules of the place of arbitration prohibiting the arbitrators from doing so.[119]

LEX MERCATORIA

Blackstone said that merchants regulated their affairs

by a law of their own called the Law Merchant or Lex Mercatoria, "which all nations agree in and take notice of."[120]

The history of lex mercatoria is extremely fascinating. For centuries mercantile questions were usually settled by private arbitration among the merchants themselves.[121] They, like the praetor, considered what was aequum et bonum and what was agreeable to the mores of honest and honourable people.[122] The law merchant was, in fact, largely based on the Roman law constantly adapted to the new exigencies of international commerce.[123]

NEW LEX MERCATORIA: A MISLEADING CONCEPT

At the present time many authors assume the existence of a new lex mercatoria. The debate has created a lot of confusion and a clarification is absolutely necessary.

Several questions arise:

1) What is meant by lex mercatoria?

2) Is is national or international?

3) When should arbitrators apply it?

1. Two different definitions of lex mercatoria can be given:

a) Lex mercatoria is the set of usages of the trade (usages du commerce) generally accepted and respected by international traders.

Goldman gives, as examples, "les usages codifies dans les Regles et usances du credit documentaire et dans les Incoterms de la Chambre de Commerce Internationale."[124]

b) Lex mercatoria is constituted by usages du commerce and legal principles generally accepted and respected by international traders.

If one accepts the narrow definition, the existence of a lex mercatoria cannot be denied. As Lew writes, "the existence of a body of rules, practises and customs which convenience has recognized as having special character in international trade cannot be denied."[125]

In contrast, the second definition implies the existence of generally accepted legal principles. These principles are seldom defined by the doctrine. It is generally indicated that they include principles such as pacta sunt servanda and protection of good faith. These principles govern commercial transactions in all jurisdictions. They are generally accepted and applied by ordinary Courts in any dispute of a commercial character, national or international.

However, they need to be clearly interpreted. Each one of them is subject to exceptions. The rule, pacta sunt servanda, can be disregarded in several circumstances, depending on each different national legislation. (Let us take the example of impossibility). The same is true for

the principle of "good faith".

If these circumstances were clearly defined by the new lex mercatoria, at that point we would be in the presence of a new independent legal system governing international commercial relations.

These principles are almost meaningless without a reference to a national legal system unless we admit that the arbitral tribunal can decide ex aequo et bono how to apply them in the particular case.

As a matter of fact, the interpretation and application the mentioned legal principles is left to the discretion of the arbitrators. In synthesis, to accept the broad definition of lex mercatoria means that an award given applying it, might become an award ex aequo et bono.

Nevertheless, as Lando points out:

> In spite of common traits, there is a difference between lex mercatoria and equity. The lex mercatoria obliges the arbitrator to base his decision on the law merchant even when equity might lead him to another result.[126]

2. For some authors, the very existence of lex mercatoria is based on incorrect assumptions. Usages du commerce and generally accepted legal principles are not international. They can be found in national law, therefore lex mercatoria is only a part of the national legislation.

However, it is the opinion of the author that the usages du commerce are truly international in character. No national legislator created them. They were elaborated by the international business community.

The a-nationality of this poorly defined "international business community" is evident.

The interpretation of an Incoterm by an arbitral tribunal should be always the same in every country. The purposes of the usages du commerce were to fill the gaps between different national legislation creating an acceptable degree of harmonization beneficial to international commercial relations. It is unrealistic to state that these usages are not international. Moreover, it is possible to think of the case of a national legislation unaware of these generally accepted usages.

3. When should arbitrators apply lex mercatoria?

At this point a universal answer cannot be given. Nevertheless, the conclusion reflects the new trend emerging after the approval of the UNCITRAL Model Law. Arbitrators are under a duty to apply the usages du commerce. "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction" (UNCITRAL Model Law, Art. 28(4)).

An analogous provision is contained in the ICC Rules (Art. 13(5)) and UNCITRAL Rules (Art. 33(3)). If we accept that the new lex mercatoria is nothing more than the particular of the trade usages, we can agree with Goldman:

> L'existence de la lex mercatoria, et la faculté, voire l'obligation pour l'arbitre du commerce international de s'y référer sont actuellement consacrée par des documents internationaux de nature diverse, et par la legislation francaise récente de l' arbitrage international.[127]

Let us take into account the new French legislation cited by Goldman:

> L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; à défaut d' un tel choix, conformément en celles qu'il estime appropriées. Il tient compte dans tous les cas des usages du commerce (Art. 1496, N.C.P.C.).[128]

It is clear that Goldman identifies lex mercatoria with usages du commerce.

But we must take into consideration also the authors who, unlike Goldman, consider lex mercatoria more than a set of "usages of the trade".

In Italy an interesting decision of the Supreme Court of Cassation has defined lex mercatoria as the body of legal precepts existing at the diffused state within the mercantile community (societas mercatorum.)[129]

The Italian judges take a broad interpretation: lex mercatoria is formed by "règles de conduite de contenus changeants, mais pro tempore déterminés."[130] Is an

arbitrator under a duty to apply these poorly identified "règles pro tempore déterminés"? It is submitted that he is not.

Notwithstanding the Italian decision, these rules are still partially undetermined. As previously noted, the application of lex mercatoria so intended would imply that arbitrators are empowered to decide according to what they think lex mercatoria is and so ex aequo et bono.

Power to decide ex aequo et bono must have been unequivocally given by the parties: "The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized him to do so" (UNCITRAL Model Law, Art. 28(3)).

The general state of confusion is reflected in Craig, Park and Paulsson in their "International Chamber of Commerce Arbitration". They start analyzing Art. 13(5) of the ICC Rules: "in all cases the arbitrator shall take account of the provision of the contract and the trade usages."[131]

Then they state that, "the requirements of Article 13(5) may be seen either as a complement to the provision of a national substantive law determined to be applicable to the contract, or as a substitute for application of a national substantive law."[132]

This is the crucial point. The application of relevant trade usages instead of national substantive law is in sharp contrast with Art. 13(3) and 13(4). A national substantive

law must always be applied by the arbitrators if they are not empowered to decide ex aequo et bono. However, that national substantive law must always be supplemented by the relevant trade usages.

> The application of trade usages may frequently fill gaps in the applicable law, since usages in the world of international commerce may frequently develop more rapidly than the law. Trade usage may be found in formalized rules such as Incoterms published by the ICC and widely accepted in international sales and shipping contracts, the Uniform Rules and Practice for Documentary Credits (also published by the ICC) in standardized conditions of contract applicable to certain industries, or included in widely accepted international treaties (such as The Hague Convention on Sales of 1955) even though such treaties do not apply as a matter of law to the transaction. Numerous other trade usages or practices will be recognized according to the nature of the transaction and field of activity. . . .[133]

> The application of trade usages is consistent with the primacy of contractual terms. Usages may be deemed incorporated into the contract as a matter of specific intent (for instance, if reference is made in the contract to Incoterms, or contracting regulations), or by implication (a custom is not referred to but is deemed by the arbitrators to have been within the contemplation of the parties). Arbitrators may thus be led to apply what is sometimes referred to as the new lex mercatoria, or international law merchant.[134]

There is no doubt that if lex mercatoria is nothing more than the set of usages enumerated by the authors, the arbitrators are always under a duty to apply it. Unfortunately, the evolution of French and Italian caselaw and the decision of the Austrian Supreme Court in the Norsolor v. Pabalk Ticaret case confirms that, "there is no doubt that international lex mercatoria comports positive juridical norms."[135]

One conclusion, far from being generally accepted, is that the arbitral tribunal, ". . . cannot apply rules of the new lex mercatoria without proper authorization".[136] But in practice:

> . . . arbitrators may apply lex mercatoria by dint of clauses authorizing them to decide on the basis of general principles of law or equitable consideration, or as amiables compositeurs. They may also deem themselves to be so authorized by Art. 13(5) of the ICC Rules, which commands arbitrators in "all cases" to "take account of . . . the relevant trade usages".[137]

In this last case, the interpretation of Art. 13(5) made by the arbitrators becomes essential. If they assume that "trade usages" means "lex mercatoria" and lex mercatoria is intended in its broad sense, they will empower themselves to decide ex aequo et bono without any authorization by the parties.

This is what happened in the Norsolor v. Pabalk Ticaret[138] case. A brief analysis of this case shows many of the practical problems faced by the arbitrators.

NORSOLOR v. PABALK TICARET[139]

A Turkish company was the commercial representative for a French company in Turkey. Following a dispute, the Turkish company initiated arbitration against the French company at the ICC in Paris on the basis of the arbitral clause in the contract between the parties. The Court of Arbitration of the ICC determined Vienna as the place of arbitration. The arbitral tribunal, which consisted of a Spanish, French and

Swiss national, rendered an award on October 26, 1979, whereby the French company was ordered to pay the Turkish company a substantial amount of money. No choice of substantive law had been agreed upon by the parties. "In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate" (Art. 13(3) ICC Rules). There was no connection whatsoever between the parties and Austria, and moreover Austria had been chosen as the place of arbitration by the ICC Court.

The choice of French or Turkish law would have led to two different solutions. The arbitrators, instead of choosing a rule of conflict and consequently the proper applicable national legal system, selected lex mercatoria as the subtantive law governing the dispute. No power to decide ex aequo et bono, in aequitas or as amiable compositeur had been given to the arbitral tribunal.

"The arbitrators affirmed that they understood lex mercatoria to include a rule that damages are payable if a contract is wrongfully terminated, causing loss to the innocent party."[140]

In Austria Norsolor sought to set aside the award, inter alia, on the ground that the arbitrators had acted beyond the limits of the arbitration agreement by deciding in aequitas without authorization to do so.

In the meantime, in France, Pabalk requested leave for enforcement of the award before the President of the Tribunal de grande instance of Paris.

1) Austria:

> The Vienna commercial court of first instance rejected Norsolor's action in a decision of June 29, 1981. The Court of Appeal of Vienna, however, set aside a portion of the ICC award (to wit the amount of damages) on January 29, 1982. Its reason was that the arbitrators had failed to conform to Article 13(3) of the ICC Rules.
>
> The Court of Appeal deemed this sentence to require the arbitrators to ground their decision in a national law determined by a conflict-of-law analysis; it was not permissible to refer to lex mercatoria.[141]

The Supreme Court reversed the decision, rejecting the argument that the arbitrators had exceeded their jurisdictional powers.

2) France:

The decision of the Tribunal de grande instance was also appealed. The Court of Appeal of Paris decided that its decision on enforcement should be adjourned until the Austrian Courts had given their decision. Eventually they granted leave for enforcement.[142]

The Norsolor case raises two main considerations:

a) when the parties do not choose a substantive law, they virtually leave to the arbitrators complete freedom to choose the applicable conflict of laws rule determining which national legal system will be applied as substantive law to govern the dispute

settlement;

b) in some cases, with a disputable interpretation of their powers, the arbitrators apply lex mercatoria.

In both hypotheses, the parties obtain an unpredictable solution of the dispute.

The uncertainty surrounding the concept of lex mercatoria will not be discussed in more detail. As an eminent author wrote just two years ago, "Si, pour un dictionaire juridique on nous demandait une définition de la lex mercatoria, que pourrait-on proposer? Je ne suis, vraiment, pas à même de répondre."[143]

However, some reflections on the freedom of the arbitrators to choose a substantive law will be expressed.

AN EQUITABLE SOLUTION

As stated previously, in the Norsolor case, as in many others, there was no express or implied choice of substantive law in the arbitration agreement.

The arbitral tribunal was under a duty to choose a rule of conflict law determining which was the law applicable to the merits of the dispute. The choice of French or Turkish law would have led to two different solutions. The arbitrators applied lex mercatoria but nobody knows exactly what lex mercatoria is, so the arbitrators

decided the dispute according to their own concept of justice (i.e. their own particular conception of the content of lex mercatoria).

Under a theoretical point of view, their decision can be criticized. In practice, they could not find a more satisfactory solution. In cases like this one, every solution is arbitrary and criticizable. The arbitrators can try to find intermediate positions between conflicting national legal systems but sometimes they face a drastic aut-aut. If they want to find an equitable solution, they must disregard both applicable national laws. If they find that the law of the place of arbitration provides a satisfactory answer, they choose to apply it.

But the application of a legal system with no connection whatsoever with the parties in dispute is not always considered fair. The arbitrators recur to lex mercatoria because from this Pandora's box they can extract an equitable solution. (Unfortunately an unpredictable solution.)

But when the arbitrators are left free to decide which conflict of law rule to apply, the solution is never predictable, unless the applicable laws contain analogous provisions. Harmonization of national laws is the answer. A process of codification of the new international lex mercatoria is the alternative.

CONDUCT OF ARBITRAL PROCEEDINGS

> The parties may agree on specific rules of evidence to be applied by the arbitrator. They may do so in the agreement to arbitrate, or in the Terms of Reference. They may thus establish rules for discovery and production of documents, for taking testimony, and for examination of witnesses. They may even agree that the arbitral proceedings shall follow the rules of a particular State Court.[144]

In fact, parties seldom do any of the above.

The arbitral trubunal enjoys wide freedom in deciding how to conduct the proceedings. ". . . The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence" (UNCITRAL Model Law, Art. 19(2)). Similar powers are conferred by Art. 14 ICC Rules, Art. 5(2), LCIA Rules and Art 25(6) UNCITRAL Rules.

The advantages of a civil-law approach in conducting arbitral proceedings has already been mentioned: civil law emphasizes documents, while common law emphasizes hearings and testimony, and the examination of witnesses.[145]

In international arbitration, the examination of a witness can create many practical problems. It may be difficult to bring witnesses and parties together at one place for a hearing. Moreover the language of arbitration can be different from the language of the witness.[146]

If in the United States, "it is a well established principle of arbitration law and practice that court rules regarding the admission and rejection of evidence do not prevail in arbitration",[147] the situation in England is

different. In Chilton Saga Holidays plc.[148] Sir John Donaldson said:

> Both courts and arbitrators in this country operate on an adversarial system of achieving justice. It is a system which can be modified by rules of Court; it is a system which can be modified by contract between the parties; but, in the absence of one or the other, it is basically an adversarial system.

The same opinion is shared by Mustill and Boyd.[149]

When choosing England as place of arbitration, it is strongly suggested writing in the arbitration agreement that English rules of evidence will not apply.

Arbitrators should be free to determine how evidence is to be administered:[150]

> (they) . . . are generally quite capable of deriving neutral principles for the presentation of evidence in international arbitration from general principles of procedural due process.[151]

In conclusion, five general principles for taking evidence should be followed by the arbitral tribunal:

1) Rules of procedure should not be copied from a single national court system, but should be developed on a pragmatic basis to deal with the case at hand;

2) due to geographical distance generally separating the parties and the members of the tribunal, the importance of documents must be emphasized, and the arbitrators should not transfer their primary responsibility for interpreting them to witnesses;

3) since they are already informed of the nature of the dispute by prior examination of documents, the arbitrators may play a greater role in the conduct of the oral hearing than would be true in common-law court proceedings, and the hearing itself should play a secondary role in the development of evidence, with the opportunity of cross-examination granted on a pragmatic basis;

4) affidavits should not be given great weight unless accompanied by the right of subsequent examination of the witness;

5) the tribunal should decide which form of expert evaluation is most appropriate to the dispute: the expert-assessor attached to the tribunal and at its constant disposal, the neutral expert appointed by the tribunal to render a report and possibly to be available for examination, or expert witnesses of the parties.[152]

ARBITRATION AND ORDINARY COURTS
INTERIM MEASURES

> When contracting parties include an arbitration clause in their commercial agreements, they provide arbitrators with the powers to rule over their dispute. As a result courts are incompetent. But the jurisdiction of arbitrators does not preclude courts to order urgent measures that do not prejudice the merits of the dispute.[153]

Arbitrators have no legal power to compel a party to comply with their decisions. As already pointed out, ordinary courts play a major role in enforcing arbitrators' orders.

However, 90% of ICC awards are complied with voluntarily. And, in practice, almost always parties comply with arbitrators' interlocutory orders "as they prefer not to antagonize the tribunal."[154]

The parties require interim court remedies because:

> The international arbitral process is relatively unsuited to rapid solutions, given the time necessary to convene an arbitral tribunal . . . and the inability of the tribunal to enforce its own orders.[155]

The situation is reflected in the UNCITRAL Model Law:

Art 17. Unless otherwise agreed by the parties, the

> arbitral tribunal may, at the request of a party, or any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require a party to provide appropriate security in connection with such measure.
>
> Art. 9. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Analogous provisions are included in the ICC Rules (Art. 8(5)), LCIA Rules (15(4)), and UNCITRAL Rules (Art. 26 (1-2-3)).

The willingness of national courts to order interim measures depends on the particular national legislation governing international commercial arbitration.

Although Craig, Park and Paulsson say that "orders in aid of arbitration are usually sought in the State where the arbitration is held",[156] it is obvious that attachments must be sought where the debtor has assets, which is usually not the country where the arbitration takes place. In Italy, "whenever an attachment is sought against a foreigner, for the Italian jurisdiction to exist, it is necessary that the foreign debtor has assets or properties located in Italy."[157]

In France:

> French courts are never competent, even if a French national is involved, to order interim measures concerning real estate located abroad. . . . Similarly, requests for attachments or interim measures to be ordered abroad, fall outside the jurisdiction of French courts, even when they involve French nationals.[158]

In Switzerland,

> . . . the attachment order may concern any asset of the defendant situated in Switzerland, such as cash, movables, securities, real estate, money claims, etc., up to the amount of the plaintiff's claim, including interest. The plaintiff has to specify the assets and their location. The attachment order is available whether or not the plaintiff is resident in Switzerland. As a result, in many cases both the defendant and the plaintiff are foreign residents and Swiss jurisdiction is established by the mere fact that assets are located in Switzerland.[159]

In England,

> . . . it is thought that Mareva injunctions will only be granted in respect of arbitrations to be held within the jurisdiction of the English Court or if they are ones to which English procedural law has been specifically applied.[160]

Some problems arise with regards to English legislation. As understood, a Mareva injunction could not be obtained in a case where the parties, an English company and an Italian trader, had entered into an arbitration, subject to Swiss law, held in Geneva. In this hypothesis, if the English company is the creditor and the Italian trader the debtor, an order to conservative attachment (for example), can be granted by the Italian courts upon application of the English creditor "who has a reasonable fear to lose the guarantee that the debtor will honour his obligations."[161]

But if the Italian trader were the creditor, and the English company the debtor, an attachment could not be obtained from the English courts, unless English law were applied by the arbitrators, or the place of arbitration were England. If this is correct, the situation is quite

astonishing.[162]

Attachments are not the only interim measures that parties to arbitrations can request of ordinary courts. Court intervention is often useful with respect to appointment of experts, technical surveys, sale or disposition of perishable goods, injunctions or appointment of a receiver.[163]

All these remedies are available in Italy, France, and Switzerland. The circumstances in which they may be obtained vary according to the national legislation concerned. However, there is no doubt that they can be sought even in support of arbitrations held abroad. The opposite is true in England, for the reasons seen above.

THE ARBITRAL AWARD

In international commercial arbitration, the award must be in writing.

> The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
>
> The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given.
>
> The award shall state its date and the place of arbitration. The award shall be deemed to have been made at that place (UNCITRAL Model Law, Art. 31).

The ICC Rules do not contain any special provisions as

to the form and contents of the award.[264]

Under LCIA Rules:

> The Tribunal shall make its award in writing and unless all the parties agree otherwise, shall state the reasons upon which its award is based. The award shall state its date and shall be signed by the arbitrator or arbitrators (Art. 16(1)).

Under UNCITRAL Rules:

> The award shall be made in writing and shall be final and binding on the parties.
>
> The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
>
> An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature (Art. 32).

The award must be drafted in accordance with any mandatory requirement imposed by the law of the place of arbitration.

In some countries, the inclusion of the reasons (ratio decidendi) in every arbitral award is mandatory.[165] In others, the parties may waive this requirement.[166]

It is clear that an award without reasons may be said to be more effective than a reasoned award: if the ratio decidendi is not expressed, ordinary courts have no real power to control the action of the arbitral tribunal.

As seen above, ICC Rules do not contain special provisions as to the form and contents of the award. Nevertheless, Craig, Park and Paulsson recommend that the reasons and an indication of the substantive law applied by

the arbitral tribunal be included.[167] According to them, "(ICC) awards invariably state reasons".[168]

Dissenting opinions are usually not annexed to the awards. This is in accordance with the civil-law practice, where there is no place for dissenting opinions in judicial decisions. It is interesting to note the provisions of the UNCITRAL Model Law (Art. 31) and UNCITRAL Rules (Art. 32(4)): If an arbitrator refuses to sign the award, the award must state the reason why this occurred. Due to these provisions, arbitral awards will at least contain an indication that there was a dissenting opinion. However, "refusal to sign is not looked upon favourably in arbitration practice."[169]

It is an uncontested principle that the arbitral tribunal has the power to make interim awards. Art. 21 of the ICC Rules divides the awards into "partial or definitive" types. The distinction between partial awards and interim decisions is not always clear. The discretion to issue one or the other depends on the rules of procedure applied by the arbitrators. "They must also determine whether there is any impediment to the grant of partial awards by mandatory laws in force at the seat of arbitration."[170]

As David points out, "it is unanimously admitted that, if there is more than one arbitrator, the award must be made after a deliberation in which all the arbitrators have taken

part."[171] This is also a mandatory rule in several countries.[172]

A problem arises: can an arbitrator disrupt the arbitral mechanism by refusing to participate in the deliberation?

Bernardini writes that there is nothing the parties can do, but:

a) the culpable arbitrator is responsible for damages (breach of contract-receptum arbitri);

b) the interested party can renew the proceeding on the basis of the arbitration agreement.[173]

However, analyzing Art. 14 of the UNCITRAL Model Law, Art. 2(8) of the ICC Rules, Art. 3(6) of the LCIA Rules and Art. 13(2) of the UNCITRAL Rules, it seems clear that an arbitrator refusing to act in accordance with his/her duties, can be replaced, without reviewing the proceeding.

A different hypotheses occurs when a majority decision cannot be agreed upon. It is necessary to examine two different situations:

a) the arbitral tribunal is formed by two arbitrators and one umpire;

b) the arbitral tribunal is formed by three arbitrators;

a) - In this first case the award can always be rendered by the umpire alone.

b) - In this second case, the laws of the place of arbitration and the provisions of the arbitration agreement become essential.

In most countries, a majority decision is required: the chairman cannot decide alone. This is the situation in Italy (Art. 825 C.P.C.), France (Art. 1470 N.C.P.C.), Switzerland (Art. 31(2) Concordat), and England (Art. 9(2) Arbitration Art. 1950). Nevertheless, Art. 31(2) of the Swiss Concordat is not compulsory.

The UNCITRAL Model Law prescribes majority decisions as a general rule:

> In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal (Art. 29).

ICC Rules empower the chairman to decide alone:

> When three arbitrators have been appointed, the award is given by a majority decision. If there be no majority, the award shall be made by the chairman of the arbitral tribunal alone (Art. 19).

An analogous provision is found in Art. 16(3) LCIA Rules. Obviously, the award rendered by the umpire alone will be set aside if the laws of the place of arbitration require the attainment of a majority. Under UNCITRAL Rules:

> When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
>
> In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal (Art. 31(1-2)).

The absence in the UNCITRAL Rules of the possibility for

the Chairman alone to render an award, has been harshly criticized, ". . . in cases where three arbitrators disagree, the chairman cannot decide alone but must compromise with one of his colleagues."[174] And, "the absence of such a possiblity (of a decision by the chairman alone) is a significant shortcoming of the otherwise generally well-conceived UNCITRAL Arbitration Rules."[175]

However, the possibility of awards with which two of the three arbitrators disagree, has also been criticized. Nevertheless, "while used only and exceptionally as a last resort . . . it serves as additional insurance against paralysis of the arbitral process."[176]

Chapter III

THE NEW YORK CONVENTION OF 1958

INTRODUCTION

The New York Convention can be considered as the most important convention in the field of arbitration. It has been defined as "the cornerstone of current international commercial arbitration."[177] As of April 1, 1987, there were 73 contracting parties.[178]

The history of the Convention is summarized by David:

> On the initiative of the International Chamber of Commerce, where the draft of a Convention had been made in 1953, it was decided by the United Nations Organization to continue the efforts made initially by the League of Nations in the field of arbitration. The Economic and Social Council (ECOSOC) set up a committee of eight members in April 1954 for a study of the matter. The committee, after 13 public sittings, issued a report in May 1955 recommending a new Convention, and it drew up a draft itself, different on many points from the draft of the ICC, which was regarded as too ambitious. The Council of the U.N. submitted the committee's draft, after its approval by ECOSOC, to governments and to various organizations. After observations had been received from 18 governments and 4 organizations, a Conference of plenipotentaries was convoked in New York for May 20, 1958. Forty-eight States sent representatives to this Conference (three of them observers only), and so did thirteen other organizations. The Conference made many changes to the draft prepared by the Special Committee of experts. The final result was a new Convention on the Recognition and Enforcement of Foreign Arbitral Awards (concluded at New York in June, 1958).[179]

Once again, the contribution of Prof. Pieter Sanders must be acknowledged.[180]

The purpose of the New York Convention is to facilitate the recognition of arbitration agreements and the recognition and enforcement of foreign arbitral awards. The definition of foreign arbitral awards can be found in the text of the Convention (Art. 1(1)).

The field of application of the Convention does not depend on the nationality of the parties but on the nationality of the award (Art. 1(1)).[181] The Convention applies also to awards made abroad in arbitrations between parties of the same nationality.[182] Two reservations should be noted:

1) approximately two-thirds of the contracting states apply the Convention only in case of reciprocity, that is to say, only to awards made in the territory of another contracting state;
2) other contracting parties apply it only to commercial arbitrations, and retain the power to define the meaning of commercial (Art. 1(3)).[183]

EXCERPT FROM THE TEXT OF THE CONVENTION

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards

made by arbitrators appointed to each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, wheher contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

a) The duly authenticated original award or a duly certified copy thereof;

b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submited, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Arts. 7 to 16 deal with ratification and accession procedures. Their examination is not within the scope of this work.

ARTICLE 5

Art. 5 requires a close examination. It is divided in two parts: grounds for refusal or enforcement ex parte (Art. 5(1)), and grounds for refusal of enforcement ex officio (Art. 5(2)). It should be noted that the word may in the text of the Convention is particularly important, because it gives to the competent authorities of the place where recognition or enforcement is sought a discretionary power to recognize or enforce awards, without reviewing the merits, even in presence of one of the grounds listed in Art. 5.

GROUNDS FOR REFUSAL OF ENFORCEMENT
EX PARTE

The grounds "to be proved by the debtor" are listed in

five paragraphs (Art. 5(1)(a), (b), (c), (d), e)).

Art. 5(1)(a) Incapacity of a party - Invalidity of the arbitration agreement.

Regarding the first part of Art. 5(1)(a), it has been noted that:

> The drafters of the Convention left open the question how the law applicable to a party - also referred to as "personal law" - is to be determined. The question must therefore be resolved by means of the conflict of laws rules of the law of the court before which the enforcement of the arbitral awards is sought.[184]

Particular problems arise about the capacity of a State or a public entity to enter into arbitration agreements. However, this issue has already been discussed.[185] It is interesting that "there is no case reported so far in which a State has invoked the incapacity to agree to arbitration under its own law when the enforcement of an award was sought against it."[186]

The second part of Art. 5(1)(a) has been described by a French author as "la grande conquête" of the New York Convention.[187]

The validity of the arbitration agreement is to be determined under the law to which the parties have subjected the agreement. The law of the place of arbitration plays only a subsidiary role.

Art. 5(1)(b) Violation of the principle audi alteram partem.

This clause allows the enforcing court to determine whether the principles of natural justice that, "each party

must be given a fair opportunity to present his case; to know the opposing case; and to meet the opposing case"[188] have been respected.

The Convention, "is silent upon the question of whose law is to be applied in this respect but the better view suggests that this, as with other public policy objections, will be governed by the lex fori."[189]

As another author points out:

> It has been argued that Art. 5(1)(b) constitutes a truly international rule, not linked to any national law. . . . However, the authors who adhere to this opinion add that the judge before whom the enforcement of the award is sought will "find his inspiration" in the notions of due process under his own law.[190]

The meaning of this observation is that a violation of the principle audi alteram partem under the law of the State where enforcement is sought, is not necessarily a violation of the same principle under the Convention. The exigencies of international commercial arbitration stress the importance of a narrow interpretation of domestic laws.

The final words of the clause were introduced to:

> . . . cover circumstances involving force majeure and the like as well as those in which the debtor was not afforded an adequate opportunity to present his case.[191]

Art. 5(1)(c) Decisions ultra petita.

Ground C can be divided into two provisions:

> The first half is concerned with the award which contains decisions in excess of the arbitrator's authority. The second half deals with the possibility

> of a partial enforcement of an award which contains both decisions within the arbitrator's authority and decisions outside that authority.[192]

This provision is directly related to the power of the arbitral tribunal to determine the limits of its competence.

The decision of the arbitrators on this issue can be reviewed by the courts of the country where enforcement is sought. "In any case, the question whether an arbitrator has exceeded his authority should not lead to a re-examination of the merits of the award."[193]

It has been said that "the question of applicable law will normally not arise, as the excess of authority is largely a question of fact."[194]

According to the second part of Art. 5(1)(c),

> The court has the discretion to grant partial enforcement of an award which is in part ultra or extra petita. A guideline for the exercise of the discretion may be that partial enforcement may be granted if the matter in excess of the arbitrator's authority is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement.[195]

Art. 5(1)(d) Irregular composition of the arbitral tribunal.

Ground d) states the importance of the agreement of the parties in respect of procedural aspects of the arbitration. Nevertheless:

> The generally accepted interpretation is . . . that notwithstanding the supremacy of the parties' agreement under Art 5(1)(d), the composition of the arbitral tribunal and the arbitral procedure are still subject to

> the fundamental requirements of due process (under the law of the place of arbitration). . . .
>
> The role of the law of the country where the arbitration took place for the composition of the arbitral tribunal and the arbitral procedure . . . can be divided into a subsidiary and a complementary role. The role is subsidiary if the parties have provided nothing in respect of these matters: in that case only is the law of the place of arbitration to be taken into account. The role is complementary for those aspects not provided for by the parties in their agreement; in these cases the law of the place of arbitration can fill the lacunae in the agreement of the parties.[196]

It should be noted that a violation of mandatory rules concerning the composition of the arbitral tribunal or the arbitral procedure will normally lead to a setting aside of the award in the state place of arbitration.[197]

Art. 5(1)(e) Award not yet binding - Award suspended or set aside.

Ground e) is one of the most controversial provisions of the New York Convention. Most of the problems arise from the interpretation of the term "binding". It is sustained that an award is not binding when it is still subject to ordinary forms of appeal in the state where the award was made.

However, it is unclear what the meaning of ordinary forms of appeal is:

> At the New York Conference of 1958, the distinction between ordinary and extraordinary means of recourse was proposed . . . : the ordinary means of recourse were used for denoting a genuine appeal on the merits of the arbitral award to a second arbitral instance or to a court. Extraordinary means of recourse was reserved for other irregularities, and especially the procedural ones, tainting a final decision. The latter means of

> recourse were meant to correspond to setting aside or equivalent proceedings. The distinction was proposed in order to make clear that if the award was still open to the possibility of another decision, it was not considered "binding", whereas, it was open to the possibility of other means of recourse, this would not prevent the award from becoming binding.[198]

According to another author, an award is not binding if it is still subject to some form of appeal - ordinary or extraordinary:

> (An award) cannot be enforced until those appeal opportunities have been exhausted or the time for taking them has elapsed. A similar limitation will probably arise where some further procedure (such as court confirmation) is mandatory in the state of arbitration . . . before that award can be put into effect.[199]

This second interpretation of Art 5(1)(e) requires a so-called "double exequatur": the award must have executory force in the country of origin in order to be enforced in the country where execution is sought.

"The system of 'double exequatur' . . . was precisely intended to be avoided by the use of the term 'binding'."[200] This problem will be further discussed.

The grounds for refusal in the second part of Art. 5(1)(e) apply only if the award has been effectively set aside or suspended in the country of origin.

> The case where a party has merely made an application for setting aside (or suspension) in that country, calls only for the possibility of an adjournment of the decision on the enforcement as provided by Art. 6 of the Convention.[201]

It should be noted that, as in all the previous cases,

the competent authorities where enforcement is sought "may" refuse enforcement. This means that those authorities have the power to enforce an award which has been suspended or set aside in the country of origin.

GROUNDS FOR REFUSAL OF ENFORCEMENT
EX OFFICIO

The grounds for refusal of enforcement ex officio, "whether or not objection is made in that respect by the debtor",[202] are listed in two paragraphs (Art. 5(2) (a) and (b)).

Art. 5(2)(a) Non arbitrable subject matters.

Recognition or enforcement of an arbitral award may be refused if the subject matter of the difference is considered non-arbitrable under the law of the country where recognition or enforcement is sought.

> Classic examples of non-arbitrable subject matters are anti-trust, the validity of intellectual property rights . . . , family law and the protection of certain weaker parties. The various subject-matters differ, however, from country to country.[203]

In Italy, for example, labour law disputes are considered non-arbitrable.

b) Refusal of enforcement of awards contrary to public policy.

We have already said that the meaning of ordre public is not clear.[204]

As Lew points out, "the uncertainty and ambiguity as to its actual content is one of the essential characteristics of public policy."[205]

If it can be difficult to determine the meaning of national public policy, it is far more difficult to define international public policy.

Generally speaking:

> Public policy is a traditional ground for the refusal of enforcement of foreign arbitral awards and foreign judgments, as well as for the refusal to apply a foreign law. A public policy provision can be found in almost every international convention or treaty relating to these matters. Its function is basically to be the guardian of the fundamental moral convictions or policies of the forum. The reason why the concept of public policy is so difficult to grasp is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various States.[206]

Public policy as a guardian, or as a barrier:

> This barrier functions just like at the frontier of every State: no persons or goods are allowed to pass the frontier if they are considered undesirable or hostile or dangerous to the host State. The officials responsible for manning the public policy "barrier" are the national court judges; they determine whether a foreign law, concept or judgment should be allowed to pass.[207]

This colorful description confirms the fact that public policy is an elusive concept. Besides, "public policy is not a constant concept. Not only is it continually changing and developing, but it varies from State to State and community to community."[208]

This is true because of the relation between public policy and the concept of morality. The relationship between law and morality has always existed:[209]

> . . . morality is to be equated with the ethic or <u>mores</u> of society which, for the sake of convenience, may be described as society's idea of what is right and

> wrong. . . . Acceptance of the "right-wrong" view of morality clearly indicates the relation between it and law, especially in the light of the definition of law based on its function to preserve peace and good order in society. For them, from the functional point of view, law may be regarded as the means by which society ensures that its mores are protected by its institutions.[210]

Morality, however, is not the only connotation of public policy. In practice, the laws of any country reject under the etiquette of "contrary to public policy" not only what is considered as immoral or contrary to the mores, but also what is considered as dangerous.[211]

In Italy, the "reorganization" of the Fascist party is a crime against public policy. The situation is more or less the same in Communist countries in respect to any attempt to create an opposition to the regime.

As Matray emphasizes, "l' ordre public concerne l' organisation politique de la société et plus récemment son fonctionnement économique et social."[212]

However,

> . . . what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases. The distinction is justified by the differing purposes of domestic and international relations.[213]

But what is the meaning of international public policy?

> L'ordre public international devient l'expression d' une moralité internationale. La construction reste cependant inspirée par la protection des intérêts nationaux superieurs des grandes nations commerçantes.[214]

This definition of Matray was given by the author in 1982. At that time, like today, the conflict between "intérêts nationaux superieurs des grandes nations commerçantes" and interests of developing countries was very clear. The possibility of very different interpretations of moralité internationale cannot (and could not in 1982) be overlooked.

International public policy, or ordre public international, is then the guardian of the interests of the major trading nations, the barrier against mutations of the status quo in international relations. This is the real meaning of ordre public international. It is not surprising at all that the doctrines on international public policy were elaborated in western countries.

Nobody really knows what ordre public international means, but everybody tries to give to the expression a definition that can be beneficial for its international policies and interests.

> . . . La jurisprudence américaine considère-t-elle comme contraires au public policy les contracts qui blessent les intérêts des pays amis, c'est-à-dire des pays avec lesquels les etats-unis ne sont pas en état de guerre.[215]

The development of an international concept of morality is impeded by the co-existence of different philosophies, religions and ideologies.

Is a contract for the sale of nuclear weapons unenforceable because it is contrary to ordre public

international? The answer will be: it depends upon who is the seller, who is the buyer and which national courts have to decide the case. As van den Berg points out, " . . . even if public policy is acknowledged to be 'international', its basis is national as it can be sanctioned only by a national judge."[216] The national judge will decide what public policy is according to his/her concept of morality and opportunity (or eventual dangerousness) of a certain legal relationship.

With the division of the world into different blocs, the notion of of ordre public regional assumes relevancy. However, in some cases, an international consensus is reached in the international community. A diffuse necessity prevails over the ideological differences and an agreement declaring certain acts contrary to international public policy is reached. A vague example is provided by Matray:

> . . . les accords sur la haute mer qui prescrivent de prendre les dispositions requises pour empecher la pollution par des produits petroliers ou par des dechets radioactifs ou la degration des cables internationaux.[217]

Thus, international public policy seems to be the expression of international convenience more than of international morality.

When a certain act or legal relation is seen as dangerous by the majority of the governments, it is

catalogued as contrary to international public policy. But if the same act or legal relation can benefit some governments, immediately it is considered legal.

As an example, although the outer space has been declared "the province of all mankind" by the United Nations, the major powers do not hesitate to use it for war purposes.[218]

In conclusion, as Matray stresses,

> Dans le forum que constituent les assemblees des nations unies, les prises de position des Etats sont motivees par leurs interets propres. L'aspect politique l' emporte generalement sur la coloration juridique.[219]

As an author points out, " . . . it seems desirable that a narrow view is taken of public policy in this context".[220] This view is consistent with international practice:

"In a great number of court decisions reported under the Convention, the distinction between domestic and international public policy is made either expressly or implicitly."[221]

Several examples can be given: "In Parsons & Whittemore Overseas Inc. v. RATKA, the United States Court of Appeals for the Second Circuit observed:

> . . . the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice.[222]

In Leopold Lazarus Ltd. v. Chrome Ressources S.A.,

> The Swiss courts affirm that a violation of Swiss public policy will only be deemed to be present where the innate feeling of justice is hurt in an intolerable manner, where fundamental provisions of Swiss legal order have been disregarded, or where the Swiss legal thinking compels prevalence over the applicable or applied law. Whether this is the case can be decided only on the basis of the facts of the specific case, whereby, when foreign decisions are to be enforced, the scope of public policy is narrower than in the case of a direct application of Swiss law.[223]

The fact that national courts apply a narrow interpretation of the concept of public policy when they have to recognize or enforce a foreign award, does not mean that a truly international public policy exists. A definition of public policy common to all the contracting parties to the New York Convention has never been given.

If a national court refuses recognition or enforcement on the basis of violation of public policy, there is no way to challenge the decision.[224]

DETACHMENT OF THE ARBITRAL AWARD

> The award rendered by the arbitrators sets forth the terms of the solution of the dispute between the parties: when rendered by international commercial arbitrators it sets forth the legal position regarding the difference from the standpoint of arbitral justice of the world business community. Both the purely national and the international commercial arbitration awards represent, on the one hand, the result of the administration of justice within a social community other than that of the State, and on the other, require recognition by the State's jurisdiction inasmuch as they imply consequences which may be of relevance to the legal system of the state itself.[225]

In international commercial arbitration, the award is almost always rendered in a country different from the one where it

has to be enforced.

> As a result, there is a widespread demand for an easy and speedy international circulation of the award on the basis of rules which enable awards wherever rendered to obtain quick recognition and enforcement wherever necessary.[226]
>
> The New York Convention responds to this demand.
>
> It has been said that the courts of the country where the award is relied upon, may refuse enforcement if the award has not yet become binding, or has been set aside or suspended in the country of origin.[227]

It follows that the courts of the country where enforcement is sought have a discretionary power: they may refuse enforcement, but they may as well enforce an award not yet binding or which has been set aside or suspended in the country of the place of arbitration. Arbitrators can disregard the law of the place of arbitration, even the mandatory rules: if the award is for that reason set aside in Country A (place of arbitration) it might still be enforced in Country B (place where enforcement is sought).

Paulsson calls this phenomenon "arbitration unbound: award detached from the law of its country of origin".[228]

GOTAVERKEN v. LIBYAN GENERAL NATIONAL MARITIME TRANSPORT CO.

Paulsson substains his theories by quoting the Gotaverken case.

At the origin of the dispute was a set of

> substantially identical contracts whereby Gotaverken undertook to construct three tankers for Libyan Maritime Co. Having previously paid three-fourths of the total purchase price, Libyan Maritime Co. refused to take delivery of the vessels, asserting (1) that contract provisions with respect to non-use of components made in Israel had been violated, and (2) that technical specifications had not been met. Gotaverken rejected these arguments and brought action to oblige Libyan Maritime Co. to take delivery and to pay the remaining portion of the purchase price (some 30 million U.S. dollars).
>
> In accordance with the contracts, the dispute was submitted to I.C.C. arbitration in Paris. The arbitral tribunal, composed of a French Chairman, a Norwegian and a Libyan, by a majority decision dated April 5, 1978 (which the Libyan arbitrator refused to sign), rejected Libyan Maritime Co.'s defence and held in favour of Gotaverken. Libyan Maritime Co. was ordered to take delivery of the vessels and to pay the outstanding portion of the purchase price, with a reduction of about 2% for deviations from the specifications. . . . Libyan Maritime Co. petitioned the Court of Appeal of Paris to set the award aside, on the grounds that (1) it was self-contradictory and insufficiently motivated in that it ordered Libyan Maritime Co. to take delivery while acknowledging that the vessels had failed to meet specifications, (2) it failed to give reasoned grounds for the computation of interests and the rejection of additional arguments raised by the parties, (3) it failed to apply the clear terms of the Libyan boycott legislation, and (4) it violated French public order because it imposed on a foreign contracting party an obligation contrary to the imperative norms of its home country (i.e., the Libyan boycott laws, which were alleged to comport criminal sanctions).[229]

The Court of Appeals of Paris concluded that, because the award had not been rendered under French rules of procedure, it was "neither French in nationality, not for other reasons subject to the French legal order."[230]

The award was defined as international or, using a controversial definition, de-nationalized. While the appeal was pending in front of the Court of Appeals of Paris,

Gotaverken attached the vessels in Sweden and sought recognition of the award in Sweden.

> One of the Libyan Maritime Co.'s central defences against these actions in Sweden was to argue that the award was not binding anywhere pending its challenge before the courts in the country where it was rendered.[231]

The Swedish courts rejected all the arguments of the Libyan Maritime Co. and enforced the award.

As a preliminary point, it should be noted that arbitral awards rendered under I.C.C. Rules are final and binding on the parties.[232] Recourse against arbitral awards can be made, however, in certain cases depending on the law of the place of arbitration.[233] As Derains points out, " . . . according to the then existing French system of recourses against arbitral awards, only awards made in a procedure governed by French law could be the object of an appeal."[234]

If the award could not be set aside in the country of origin, where could Libyan Maritime Co. initiate this action?[235] This question, raised by van den Berg, is perfectly justified, however it is based on incorrect assumptions. Quoting Derains again, "a special procedure for setting aside non-French awards, available at that time (<u>la tierce opposition</u>), could have been used by the parties."[236] According to Paulsson:

> The decision of the Court of Appeals of Paris constitutes clear acceptance of the detachment phenomenon. Its underlying thesis is that the legal

> force of transnational arbitration is founded on the parties' creation of a contractual institution; the effect of the proceedings may be left to be controlled by whatever legal system is requested to recognize the award once it is rendered, and that system need not necessarily be that of the place of arbitration.[237]

Paulsson's opinion has been defined as a "dangerous heresy" by Park.[238]

> That Paulsson should concern himself at all with the French decision in the Gotaverken affair is surprising. One would expect illustration of his thesis by an award annulled under the lex loci arbitri but nevertheless enforced in a country where the loser has assets. In Gotaverken, however, France refused to annul the award. . . . The award in Gotaverken was not annulled. Rather, the French court found the award not subject to a challenge procedure (appel en nullité) available only to French awards.[239]

Greater precision in analysis is necessary. French courts refused to annul the award, however the Swedish courts, using the discretionary power given to them by the use of may in Art. 5 of the New York Convention, enforced it without waiting for the decision of the Court of Appeals of Paris. What if the French judges had annulled the award? An award considered null in the country of origin could have been enforced in another State.

> The Swedish courts deemed the award to have been "binding" - in the sense of the New York Convention - as of the moment it was rendered. This was because in accepting to arbitrate under the I.C.C. Rules, the parties had waived the right to appeal. It is significant to note that the Swedish courts did not inquire whether the award was binding under French law but as a function of the parties' contractual stipulation, recognized and given effect by the Swedish legal system. And the Swedish Supreme Court specifically declined to follow Libyan Maritime Co.'s suggestion, adopted by a dissenting judge, at least to

> suspend enforcement pending the outcome of the French challenge proceedings.[240]

The fact that Swedish courts did not inquire whether the award was binding under French law, is particularly important. Following this line of reasoning, every award is immediately enforceable after it is rendered, no matter if any action for annulment has been brought in the country of origin. This is the "dangerous heresy" that has created a doctrinal debate.

Supporters of the "party autonomy" theory seem to agree with the position taken by the Swedish judges.

> By virtue of the provisions included in the New York Convention the parties are free to make recourse to any private regulation of the arbitral procedures . . . (and) by so doing they are entitled . . . to organize an arbitral procedure wholly independent from any local system of law.[241]

Acceptance of the "party autonomy" theory, if taken to its extremes, leads to the conclusion that arbitration is completely independent of the laws of the country where it takes place, even when they have mandatory character.[242]

On the other hand, supporters of "territorial principle" criticize the decision, affirming that:

> The fundamental principle of the New York Convention is that of the application of a territorial law: an award must be valid according to the law of the country where it has been rendered in order to be enforceable in other countries.[243]

Acceptance of the territorial principle has led to aberrant results in the past, when, taken to its extremes, excluded the possibility of choice of any substantive law

other than the lex loci arbitri.[244]

However, it is undeniable that the New York Convention has implemented, to a certain extent and with exceptions, the "territorial principle".[245]

> It was the International Chamber of Commerce which first launched the idea of an arbitral award completely independent of any national arbitration law. . . . Although the extensive debates of the New York Conference are not entirely clear on this point, it can be assumed that the idea was . . . rejected.[246]

The rule seems to be that an award, in order to be enforced somewhere, also has to be binding in the country of origin. However, in some exceptional cases the courts of the country where enforcement is sought may enforce awards suspended or set aside in the country of origin.[247]

In practice, Gotaverken is the only case in which a national court enforced a suspended award. Only one award has been enforced after the authorities of the place of arbitration refused to recognize it.[248]

In which cases should national courts use their discretionary power and enforce an award set aside in the country of origin?

The doctrine has not developed sufficiently to answer this question yet. However, some opinions have been expressed. As Paulsson underlines:

> . . . it should be recognized that purely national considerations relating to enforcement procedures which may vary from one country to the next . . . should not have a prejudicial effect on the binding nature of the award in the transnational perspective.[249]

Park himself, although skeptical about the detachment phenomenon, stresses that:

> . . . post-annulment recognition would however, seem appropriate in two circumstances. The first would require that the arbitration arise under the European Convention on International Commercial Arbitration (commonly referred to as the Geneva Convention of 1961),[250] covering disputes between nationals of different contracting States. Annulment of an award in its country of origin constitutes a ground for refusal of recognition under the European Convention only when annulment is for specifically enumerated reasons, such as the invalidity of the arbitral agreement or lack of proper notice to the parties. . . . The second situation in which one might approve enforcement of an award annulled in its country of origin is where the local judiciary is corrupt or biased. . . . Enforcement of such an award by a country where the debtor . . . has assets would seem neither improper nor inappropriate.[251]

Paulsson concludes that de lege ferenda, national courts should, "control the award's conformity with international minimum standards, not with the particular rules of (their) national legislation."[252]

If the wording is particularly unfortunate (national courts must obviously apply the laws of their own country), the message is that a process of harmonization of national laws is desirable.

However, a final remark seems appropriate. With the New York Convention a most important result has been achieved: enforcement of a foreign arbitral award can be refused only in limited circumstances determined not by national rules, differing from jurisdiction to jurisdiction, but by

international law implemented uniformly in each contracting state.

Chapter IV

NEW TRENDS IN INTERNATIONAL COMMERCIAL ARBITRATION

UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration on June 21, 1985.

> The provisions of the Model Law have been formulated by government representatives and arbitration experts from 60 States, as well as various international organizations. They have also been extensively discussed in many corners of the world. . . . It may suffice to recall the massive "hearing" at the (International Council for Commercial Arbitration) ICCA Interim Meeting in Lausanne in May, 1984.[254]

Several articles of the Model Law have been examined within this work.

The Model Law was designated, "to achieve harmonization of arbitration laws insofar as international commercial arbitration is concerned".[255]

It should be pointed out that the Model Law is not a treaty. As its title indicates, it is a model which national legislators can use for introducing a domestic arbitration law specifically geared to international arbitration.[256]

The General Assembly of the United Nations recommended that:

> . . . all States give due consideration to the Model Law on International Commercial Arbitration in view of the desirability of uniformity of the law of arbitral

> procedures and the specific needs of international commercial arbitration practice.[257]

Several countries have adopted laws in accordance with the principles of the Model Law.[258]

In the next part of this work the laws of four different countries will be briefly analyzed.[259]

It should be pointed out that, while Italy, France and England had modified their laws on arbitration before the approval of the Model Law, Switzerland has done so in December, 1987.[260]

In fact, the new Swiss legislation on international commercial arbitration can be said to be far more innovative than the Model Law itself.[261]

ITALY

In Italy the legislation concerning international commercial arbitration has been amended through the enactment of Law No. 28 of February 9, 1983, changing articles 812, 823, 825 and 829 of the Code of Civil Procedure.

> The rules contained in the law are few in number, but of paramount importance to the goal of harmonizing Italian domestic legislation with the provisions of the multilateral conventions on arbitration to which Italy has adhered in particular the New York Convention of 1958. . . .[262]

The Italian situation is quite peculiar, in the sense that two distinct forms of arbitration co-exist: arbitrato rituale (procedural arbitration), and arbitrato irrituale (free, or contractual arbitration). The distinction remains

even after the recent amendment.

ARBITRATO RITUALE AND ARBITRATO IRRITUALE

As Bernini points out:

> One is faced with arbitrato rituale (procedural arbitration) whenever the parties intend to request jurisdictional type of activity from the arbitrator(s) that leads to an award (lodo), which may acquire the status of a judgment (res judicata) by means of a leave of enforcement (exequatur) granted by the local Magistrate Court (Pretura). One is faced with arbitrato irrituale (contractual arbitration) whenever the parties intend to settle a dispute by means of a decision in the (private law) form of a contract. . . . The arbitral award stemming from an arbitrato irrituale is binding upon the parties but has no executory force. Lacking voluntary performance, the party concerned must inevitably turn to the courts in order to secure enforcement. Recourse to the courts may take the form of ordinary proceedings or, under certain circumstances, a request for summary judgment (Decreto ingiuntivo). In either case, however, only the final judgment rendered by the court will have the force of res judicata, thus allowing the winning party to carry it into effect by means of execution proceedings.[263]

Problems arose after the enactment of the New York Convention of 1958 because it was argued that the Convention did not apply to arbitrati irrituali.[264]

It must be noted that the Italian judiciary did its utmost to overcome the problem. "The Supreme Court of Cassation went so far as to explicitly hold that even arbitrato irrituale falls within the scope of the New York Convention."[265]

If a final word on the applicability of the New York Convention to arbitrati irrituali cannot be said, after the legislative reform many of the reasons which compelled

Italian traders to resort to arbitrato irrituale cease to exist.

THE LEGISLATIVE REFORM

Law No. 28 of February 9, 1983 is divided into four articles. Before the reform, only Italian citizens could be appointed as arbitrators in arbitrato rituale. The arbitral award of an arbitrato rituale (lodo) came into legal existence only after securing the exequatur from the Magistrate Court (Pretura). Also, the parties were under a duty to deposit the award with the court within five days of the date of the signature of the arbitrator, otherwise the award was null and void. As David points out in a comment of the Italian legislation before the reform:

> Arbitrators are not entitled to pronounce judgments; they may only express an opinion (lodo), which can only become an arbitral award (sentenza arbitrale) through the intervention of a judicial decree (decreto di esecutorietà) issued by a lesser judicial authority, the pretore.[266]

The exequatur was issued only after a heavy tax was levied. The Italian discipline of arbitrato rituale was unsatisfactory for business people. In order to avoid these provisions, it was a common Italian practice to resort to arbitrato irrituale.[267]

However, due to the doubts concerning the applicability of the New York Convention of 1958 to arbitrato irrituale, the Italian legislation on arbitration was unsuitable for international commercial arbitration. Today, after the

reform:

> Most, if not all, of the reasons for which parties resorted to arbitrato libero (irritual) have thus disappeared and parties will most likely refrain henceforward from resorting to this practice. . . .[268]

Article 1

"The arbitrators may be Italian citizens or citizens of other countries" (Art. 812 C.P.C.).[269]

Quoting Bernini:

> Although the bar to foreign arbitrators applied only to arbitrato rituale, the amendment is to be praised as representing the dutiful acknowledgement of an elementary need of international arbitration which hardly deserves comment.[270]

Article 2

(The award shall contain:)

. . . 5) the indication of the place in which the award was decided; 6) the signatures of all arbitrators, with the indication of the day, month and year when they were made; the signatures may also be made in a place other than that in which the decision was made, as well as abroad. If there is more than one arbitrator, the various signatures may be made in different places without requiring that the arbitrators meet personally again (Art. 823 (5-6) C.P.C.).

This provision, amending numbers five and six of article 823 C.P.C., obliges the arbitrators to include an indication of the place where the award was decided.

The former text of the article in question merely referred to the date and place in which the award was subscribed by the arbitrators.

Throughout the law a distinction is thus created between the deliberation (that is, decision of the award, which is to be carried out in Italy by the arbitrators in personal conference), and the signing of the award which can take place outside of Italy (each arbitrator being allowed to affix his signature individually).[271]

A new paragraph is then added to Art. 823, "the award shall be binding on the parties from the date of the last signature."

This provision must be analyzed in connection with the former text of Art. 823 (still in force) which provides that:

> . . . an award signed only by the majority of the arbitrators shall be valid provided that mention be made that it was decided in the presence of all the arbitrators and states expressly that the others were either unwilling or unable to sign it.

Article 3

> The arbitrators shall write up the award in as many original copies as the number of parties and give one original copy or send it by registered mail, to each of the parties within ten days after the last signature. The parties intending to have the award enforced in the territory of the Republic must file an original copy of the award together with the submission or the document incorporating the arbitration clause or an equally valid document, in the Record Office of the Magistrate Court ("Pretura") of the district in which the award was decided, within one year from the date of receipt of the award. The above-mentioned time limit is peremptory (Art. 825 C.P.C.).

These provisions radically changing Art. 825 C.P.C., are extremely important. After the reform, only the parties intending to have the award enforced in Italy are under a duty to obtain a judicial decree (decreto di esecutorietà or exequatur) from the Magistrate Court. For this purpose, they have to "deposit" an original copy of the award, together with a copy of the document incorporating the arbitration agreement within one year from the date of receipt of the award.

The unreasonable time limit of 5 days has finally disappeared. Besides, the deposit of the award with the court has become "optional".[272]

The award is not null and void if the parties do not provide for its deposit within one year, but it remains fully effective in the form of a contractual obligation.

Article 4

Article 4 is important for what disappeared and not for its text.

> In accordance with the principles illustrated above, article four of the Law brings about the proper amendments to article 829(5) of the C.P.C., establishing the grounds of nullity for lack of formal requirements of the award. Under the former text of Art. 829 the award was null and void (rectius, legally inexistent) (without) . . . the deposit of the award with the Magistrate Court.[273]

This ground of nullity has been eliminated. If the parties do not deposit it with the Magistrate Court, the award is nevertheless binding on the parties as a contractual

obligation.

ITALIAN LEGISLATION AND UNCITRAL MODEL LAW

As Bernini points out,

> In the framework of the New York and Geneva Conventions, the elimination of the obligation to deposit the award in Italy is greatly welcomed. In the past, whenever an award stemming from arbitrato rituale was to be enforced abroad, the legal necessity of the prior deposit in Italy brought about the ghost of the "double exequatur", in flagrant contradiction with the provisions of the conventions. Now, the facultative nature of the deposit has smoothly inserted awards rendered in Italy into the system of recognition and enforcement of foreign arbitral awards devised by the drafters of these conventions.[274]

The Italian legislation, after the reform of 1983, is generally in accordance with the UNCITRAL Model Law of 1985. In particular:

> . . . the parties can establish in the submission or in the arbitration clause or in a subsequent written agreement, provided that this precedes the commencement of the arbitral judgment, the rules of procedure by which arbitrators are to proceed.
>
> Failing such instructions, the arbitrators are empowered to settle the manner in which the proceedings will be conducted, as they best see fit (Art. 816 C.P.C.).

There are no relevant differences between these provisions and Art. 19 of the Model Law.

With regards to substantive law,

> The arbitrators shall make their award according to the rules of substantive law unless the parties have, in any way, authorized them to settle the dispute according to equity (Art. 822 C.P.C.).

In Art. 822, the word 'equity' must be interpreted as having the same meaning as ex aequo et bono or as amiable

compositeur.[275] Art. 28 of the Model Law uses, in fact, "ex aequo et bono and amiable compositeur". Apart from the different wording, no difference can be seen.

The express provision that the arbitrators must decide according to the rules of substantive law does not clarify if the arbitral tribunal has the power to decide applying only lex mercatoria with the exclusion of any national substantive law.

Unlike Art. 28 of the UNCITRAL Model Law which provides that the applicable trade usages have to be taken into account in all cases, the Italian legislation is silent on this point. Nevertheless it must be remembered that the Italian Supreme Court of Cassation, in its decision of February 8, 1982, No. 722[276] said:

> . . . the structures of the mercantile society, and particularly those providing for arbitral justice, should operate effectively both on the level of the lex mercatoria and that of the legal system in which they are usually rooted.

This can be seen as an incitement to apply lex mercatoria in a supplementary way. In conclusion:

> Whenever the arbitral venue is to be located within the territory of the Italian Republic, foreign parties, as well as foreign arbitrators, will feel at ease by facing rules and practices generally accepted at the international level.[277]

FRANCE

In France the legislation concerning international commercial arbitration has been amended through the enactment of Decree No. 81.500 of May 12, 1981, introducing two new books (livres) into the Code of Civil Procedure (N.C.P.C.) Book III and Book IV. Book IV is devoted to arbitration. It contains six titles, from Art. 1442 to 1507.[278]

> French arbitration law has long recognized the special status of international arbitration. This distinction between domestic and international arbitration evolved in French case-law over several decades, and was codified with some modification by the 1981 Decree mentioned above, following by a year an earlier decree revising French domestic arbitral procedure.[279]

Some key principles that do not appear in the New Code of Civil Procedure, but stand at the base of the French legislation, must be remembered:

> First the validity of an arbitration agreement cannot be contested on the ground that the main contract is null (the "separability" principle). Second, no state or public entity, when it is a party to an international contract, shall be allowed to challenge the validity of an arbitration clause to which it has agreed on grounds that the domestic law prohibits the state and its entities from arbitrating. A third consideration relates to public policy concerns. French courts have ruled that a dispute is arbitrable despite the fact that its adjudication involves the application of rules which have a mandatory (ordre public) character, such as exchange control regulations.[280]

THE DECREE OF MAY 12, 1981:
TEXTUAL ANALYSIS

Art. 1492 N.C.P.C. defines international arbitration: "Arbitration is international if it implicates international

commercial interests."[281] This definition, elaborated by the Supreme Court, is different from that of the European Convention on International Commercial Arbitration of 1961 (Art. 1(a)).[282]

Unlike the Geneva Convention of 1961, the French definition does not adopt a territorial approach.[283]

Art. 1492 " . . . Consacre . . . par une disposition de droit écrit, le critère économique de l'arbitrage international, déjà retenu par la jurisprudence antérieure."[284]

The result is that:

> The international character of a specific arbitration has to be decided upon case by case, on the basis of an assessment of the involvement of international trade interests. Elements such as the nationality of the parties, their place of business, the place of performance of the main contract, the place of arbitration, the applicable law, or the intervention of an international institution will be taken into consideration, but none of them will be really determining when taken separately. For instance, an arbitration taking place in France, according to French Procedural Law, may be an international arbitration under Art. 1492 of the Code of Civil Procedure if the subject matter in dispute arises from an international sale, even if both parties are French companies.[285]

Art. 1493 is concerned with the constitution of the arbitral tribunal:

> The arbitration agreement may, directly or by reference to a set of arbitration rules, designate one or more arbitrators or provide the manner for their election. If any difficulty arises in the constitution of the arbitral tribunal with respect to an arbitration taking place in France, or to

> one for which the parties provided have agreed that French procedural law should apply, either party may, in the absence of a clause to the contrary, apply to the President of the Tribunal de grande instance of Paris in the manner set forth in Article 1457. The Constitution of the arbitral tribunal is a delicate phase in the arbitration process. Sometimes the intervention of an external authority becomes indispensable. This authority is the President of the Tribunal de grande instance. He will act only ex parte as juge des referes, i.e., following a summary procedure.[286]

However, the parties can always waive the possibility of application to the President.

Articles 1494 to 1497 relate to the applicable law. The parties enjoy complete freedom in determining rules of procedure.

> The arbitration agreement may, directly or by reference to a set of arbitration rules, define the procedure to be followed in the arbitral proceedings, it may also subject them to a given procedural law.
>
> If the agreement is silent, the arbitrator, either directly or by reference to a law or a set of arbitration rules, shall establish such rules as may be necessary (Art. 1494, N.C.P.C.).

It should be noted that the application of a national procedural law is considered by Art. 1494 as an exceptional case, while the rule is to conduct the proceedings in accordance with a set of arbitration rules. The expression "set of arbitration rules' means according to rules of an institution or to UNCITRAL Rules.

Similar freedom is enjoyed by parties and arbitrators in

determining under which substantive law the dispute will be decided.

> The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to those he deems appropriate.
> In any case, he shall take into account trade usages (Art. 1496, N.C.P.C.).

This article, which has already been mentioned,[287] gives, once again, complete freedom to parties and arbitrators. The only limitation can be found in Art. 1497: "The arbitrator shall decide as amiable compositeur if the parties' agreement conferred this authority upon him."

Thus, the parties can choose any kind of law applicable to the merits of the dispute, - national, international or lex mercatoria. However, if they want to give the arbitrators the power to decide disregarding the law, as amiables compositeurs, they have to expressly confer this power upon them.

As a consequence, the arbitrators, in the absence of an indication by the parties, can decide which laws are applicable. Their determination of the dispute must apply some principles of law, unless they are empowered to decide as amiables compositeurs. They can also apply more than one legal system to different sections of the contract (depecage).

It should be noted that the French legislation in respect to applicable law is quite different from the UNCITRAL Model Law. Under Art. 28(2) of the Model Law, "Failing any designation by the parties, the arbitral

tribunal shall apply the law determined by the conflict of laws rules which it considered applicable." Applying a conflict of laws rule, the arbitrators are under a duty to decide that a certain national set of rules is applicable to the merits of the dispute, whereas under Art. 1496 N.C.P.C., lex mercatoria and international law can also be applied. On the contrary, under both French law and UNCITRAL Model Law, arbitrators are under a duty to take trade usages into account.[288]

Arts. 1502 and 1504 deal with grounds for annulment of the award. There are five grounds listed in Art. 1502. An action can be brought: First, if the arbitrator decided in

> . . . the absence of an arbitration agreement or on the basis of a void or expired agreement; second if the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed; third if the arbitrator decided in a manner incompatible with the mission conferred upon him; fourth if due process (literally the principle of an adversarial process) was not respected; fifth if recognition or enforcement would be contrary to international public policy (ordre public international).

No appeal is available against awards issued in France in an international arbitration.[289] However, in the cases stated above, "a direct challenge may be brought by way of a petition for annulment (recours en annullation)".

The action for annulment must be brought before the Court of Appeals in the jurisdiction in which the award was rendered.[290] It should be noted that, "the action may

be filed as soon as the award has been notified to the parties by the arbitrators, but at the latest within one month after the notification of the exequatur order".[291]

This creates a peculiar situation because the party seeking enforcement is not interested in obtaining exequatur (leave of enforcement) in France, but only in obtaining enforcement in the country where the losing party has assets.

Seeking execution abroad without approaching the French Courts for confirmation of the award by exequatur leaves the award potentially subject to a recours en annulation in France.[292]

On the other hand:

> Where the losing party does not voluntarily comply with the award, the party wishing to enforce an international award rendered in France may establish that the award is not voidable in France by seeking its judicial recognition (exequatur), thus triggering the thirty day period for challenge.

Such a step has the disadvantage of inviting litigation. Furthermore, execution of the award is suspended during not only the thirty day period, but also for the duration of any challenge action that may be brought. The fact that such execution is suspended may have adverse effects on execution abroad under Article 5(1)(a) of the New York Convention.[293]

FRENCH LEGISLATION, UNCITRAL MODEL LAW AND NEW YORK CONVENTION

The French legislation on international commercial arbitration is one of the most advanced in the world.

Particular emphasis is placed on the autonomy of the parties. This approach differs in many ways from the UNCITRAL Model Law and the New York Convention. As already stated, the parties or the arbitrators can decide the dispute in accordance to règles de droit instead of loi.[294]

Also Art. 1502 N.C.P.C. is substantially different from both the UNCITRAL Model Law and the New York Convention. Enforcement or exequatur of an award rendered in international commercial arbitration can be refused only if the award is contrary to international public policy (ordre public international). Art. 34 (2)(b) of the UNCITRAL Model Law says that "An arbitral award may be set aside . . . if: the award is in conflict with the public policy of this State."

The same words are used in Art. 35 and Art. 5 (2)(b) of the New York Convention.[295]

As Goldman points out:

> De manière générale, la réglementation française est plus libérale que la Convention; mais ces différences ne sont pas source de difficulté, puisque selon l' article 7 de la Convention, les dispositions de celle-ci . . . ne privent aucune partie intéressée du droit qu' elle pourrait avoir de se prévaloir d' une sentence arbitrale de la manière et dans la mesure admises par la législation ou les traités du pays où la sentence est invoquée.[296]

In conclusion, France is a most hospitable forum for international commercial arbitration.

French judges have demonstrated a particular reticence

> to interfere with the arbitral process when international commercial relations are implicated. This attitude of judicial restraint has been embodied in the 1981 Decree.[297]

Besides, the choice of France as a venue for arbitration is also inspired by the presence of the International Chamber of Commerce, the outstanding qualification of Paris's lawyers in arbitration matters, and "its reputation as an acceptable meeting ground for parties of diverse economic and cultural tendencies, including the divergent interests of developed and developing countries".[298]

SWITZERLAND

As an author points out: "the canny Swiss have long flaunted their strategically tailored neutrality as an inducement to attract businesses from all over the world."[299]

As a matter of fact, today Switzerland is frequently chosen as place of arbitration in international contracts.

> Under the Swiss Constitution, the twenty-six cantons within the Helvetic Confederation retain competence over judicial organization, procedure and administration of justice. As contracts of a procedural nature, therefore, arbitration agreements are governed by cantonal law.[300]

Although international arbitration agreements are governed by the Federal Statute on Private International Law of December 18, 1987,[301] cantonal law will still govern international arbitrations if the parties so choose (Federal Statute, Art. 176(2)).

Both aspects of the Swiss legislation on arbitration must therefore be analyzed.

THE CONCORDAT ON ARBITRATION[302]

Due to the Concordat on Arbitration of March 26, 1969, the cantonal laws on arbitration, with the exception of four cantons out of 26, are uniform. However, "all the Swiss cantons that have gained importance in international arbitration are signatories of the Concordat."[303] It is important to note that the Concordat expressly supersedes any legislation on arbitration in the signatory cantons.

Nevertheless, "it appears possible that caselaw may diverge from canton to canton with respect to those provisions of the Concordat that require interpretation and thus allow variation."[304]

The main principles of the Concordat must be briefly summarized.

According to Art. 1(1), "The Concordat applies to any arbitral proceeding with its seat in a signatory canton."[305]

Art. 1(2)(d) gives the party the opportunity to apply institutional arbitration rules or to determine their own, however they are under a duty to respect any mandatory provisions of the Concordat. These mandatory provisions are listed in Art. 1(3). This fact "constitutes an explicit

recognition that arbitral proceedings are governed by the lex loci arbitri."[306]

Arbitration agreements are divided into compromis and clause compromissoire[307] (Art. 4) and must be in writing (which includes telegram or telex).[308]

> Parties can stipulate that all three arbitrators or, more frequently, the chairman of the arbitral tribunal or the sole arbitrator will be chosen by the Swiss Federal Court or its President, or still the presidents of cantonal courts.[309]

In the absence of an agreement by the parties (or a reference to the rules of an institution), the arbitral tribunal is composed of three members (Art. 1(1)).

> The Concordat recognizes arbitrators authority to rule on their own jurisdiction, in either an interlocutory order or a final award.[310] Any exception to arbitral jurisdiction must be raised before any argument on the merits of the dispute, by an interlocutory plea to the competent court. The arbitrators' interlocutory award (sentence partielle) on such matters as their own competence, and the validity of the arbitration agreement or of the main contract, is subject to immediate appeal (Art. 8-9).[311]

These rules have mandatory character.

Under Art. 24(1), "The arbitral procedure is determined by the parties' agreement, or by decision of the arbitral tribunal." However, the freedom of parties and arbitrators is subject to an important limitation: if they cannot agree on an applicable set of rules of procedure, Swiss federal procedural law has to be applied (Art. 24(2)).

With respect to substantive law, the Concordat is "deliberately vague."[312]

Under Art. 31(3):

> The arbitral tribunal decides according to the applicable rules of law (secondo le norme del diritto applicabile), unless the parties, in the arbitration agreement, have authorized it to judge according to aequitas (equità).

The meaning of the applicable rules of law is open to interpretation. However, it is submitted that the law governing the merits of the dispute does not have to be the law of the arbitral seat.[313]

It should be noted that Art. 31(3) is not within the provisions considered mandatory in Art. 1(3). Thus, if the parties make clear in the arbitration agreement that the arbitrators have the power to decide the case in accordance to principles of lex mercatoria or international law, the provision is valid.

In contrast, when the parties have not included any indication of the applicable law, the arbitrators have to decide the case in accordance with a national substantive law. This theory is supported by the fact that there must be explicit consensus of the parties to derogate from a non mandatory provision of the Concordat. Once again, the term aequitas should be considered as equivalent to ex aequo et bono or amiable composition.[314]
Particularly important are the provisions concerning the form of the award, due to the mandatory character of some of them.

Under Art. 31(1) "All the arbitrators must participate in the deliberations and the decisions of the arbitral tribunal." The decision is taken by a majority vote, unless the arbitration agreement provides otherwise (Art. 31(2)).

Under Art. 33(1), the award must always contain:

1) the names of the arbitrators;

2) the designation of the parties;

3) the indication of the arbitral seat;

4) the conclusions of the parties, or in the absence of them, the definition of the controversial issues (delimitazione dei punti litigiosi);

5) the decision on the substance of the dispute.

The award does not have to be signed by all the arbitrators "if the majority include a statement of the minority's refusal to sign".[315]

It has been pointed out that "the mandatory challenge and review under the Concordat permit a significant recourse to the courts that cannot be excluded by agreement of the parties."[316] The degree of control on arbitral awards exercised by Swiss courts is quite wide. Two challenge procedures are available: review (revisione) and annulment (ricorso per nullita). "Review may be sought either (1) when the award is affected by acts such as fraud - deemed criminal under Swiss law - or (2) when it is rendered in ignorance of important facts, or 'evidence of decisive importance'" (Art. 14).[317]

Under Arts. 42 and 43:

> An application for (review) . . . must be made within sixty days of the applicant party's discovery of the grounds for review, and in no event later than five years after the award. If the application is sustained, the case is returned to the arbitral tribunal (or if necessary to a new tribunal) for de novo adjudication.[318]

The annulment of the arbitral award can be requested in nine cases listed in Art. 36(1). Specifically,

> The Concordat provides that an award may be set aside by the cantonal court when the arbitral tribunal:
> 1) was improperly constituted;
> 2) erred as to its jurisdiction;
> 3) ruled on matters not submitted to it;
> 4) violated a party's due process rights (literally "right to be heard");
> 5) awarded a party something other than claimed;
> 6) made an "arbitrary" award;
> 7) ruled after expiration of its mission;
> 8) did not respect the provisions on the form of the award;
> 9) fixed its fees at a manifestly excessive level.[319]

The annulment of the award must be sought within 30 days from its notification (Art. 37(1)). "The action for annulment . . . may be heard only after the party has exhausted all appeals available under the arbitration agreement".[320] Under Art. 39 the court, if the annulment is accepted, "may set aside all or part of the award, or may return it to the arbitrators for correction but may not revise the award itself."[321] Under Art. 40, the court has the power to partially annul the award.

In any case of annulment, the same arbitrators decide once again the dispute, except when they have been challenged for any reason.

The Concordat has always raised perplexities in relation to the degree of control over the award exercised by the national courts. In particular, Art. 36(1) provides that annulment of an award is permitted if the award is affected by arbitrariness. The discretion left to national courts in defining the meaning of arbitrariness was seen by many authors as "incompatible with the needs of international commerce."[322]

The Concordat, in force for almost 20 years and applicable to both national and international arbitration, needed to be integrated by provisions tailored appositely for the special exigencies of the modern international arbitration process.

THE FEDERAL STATUTE[323]

The Federal Statute on Private International Law was approved by the Swiss Parliament on December 18, 1987, after more than five years of deliberation. Chapter 12, which concerns international arbitration, is radically different from the Concordat. The Concordat contains numerous mandatory provisions:

> . . . that were felt to be somewhat outdated in today's more flexible and increasingly competitive international arbitration environment.[324]

The Statute applies only to international arbitration, recognizing its special status and necessities. Under Art. 176(1), an arbitration is international " . . . when at least one of the parties, at the time of the conclusion of

the arbitration agreement, had neither its domicile nor its habitual residence in Switzerland." This "subjective" approach differs from the French one, which looks at the object of the contract in which the arbitration agreement is included.[325]

Under Art. 177(1), "Any claim related to a party's assets, rights or liabilities may be submitted to arbitration." It should be stressed that this definition of arbitrable matters is particularly broad, "encompassing all kinds of rights and liabilities."[326]

Art. 177(2) deals with states or state entities entering into arbitration agreements. As in many other jurisdictions (e.g., Italy, France and England):

> A State or an enterprise or organization under state control which is a party to an arbitration agreement may not invoke its own law in order to challenge the arbitrability of the dispute or its capacity to be a party to the arbitration.

Art. 178 deals with the formal requirements of the arbitration agreement. The separability theory is reflected in Art. 178(3): the arbitration agreement is valid even if the main contract is "invalid".

Arts. 179, 180 and 181 regulate the establishment of the arbitral tribunal and the beginning of the arbitration proceedings.

Arts. 182-186 deal with the arbitration procedure.

> Following the general trend, the rules governing procedure grant large freedom of choice to the parties. However, equal treatment and the right to be heard in an

> adversary proceeding are mandatory (Art. 182(3)).[327]

No problem arises, except that the word 'adversary' used in the English translation of Art. 182(3) seems misleading. In fact, it means that the principle audi alteram partem has to be respected. It has no connection with the adversarial procedure of common law countries.

Under Art. 187(1), "The arbitral tribunal shall apply the rules of law chosen by the parties, or failing such choice, the rules of law most closely connected to the dispute."

Once again, it has been pointed out that:

> Reference to the "rules of law" rather than the "law" suggests that the parties, or alternatively the arbitrators, may (1) select different laws to govern various aspects of the transaction (depecage), (2) "freeze" the law at any point in time, or (3) resort to general principles of international law rather than the law of any particular jurisdiction.[328]

Lex mercatoria may also be applied, whereas the aritrators cannot decide the dispute ex aequo et bono unless the parties have conferred them the power to do so (Art. 187(2)).

No reference to trade usages is included in Art. 187, unlike both the UNCITRAL Model Law (Art. 28(4)) and French legislation (Art. 1496 N.C.P.C).

Art. 189 gives the chairman of the arbitral trubunal the power to decide alone when a majority decision cannot be reached.

The award shall state the reason on which it is based, unless the parties have waived such requirement. Arts. 190-194 are particularly innovative. Under Art. 190(1), "An award is final as of its communication."

Art. 190(2) sets forth the grounds in which an award may be attacked.

> An award may be attacked on the following grounds only:
> a) when the sole arbitrator or the arbitral tribunal was appointed in violation of the applicable rules;
> b) when the arbitral tribunal erroneously held that it had or did not have jurisdiction;
> c) when the arbitral tribunal ruled on issues beyond the scope of the claims or failed to rule on one of the claims submitted;
> d) when the arbitral tribunal failed to grant the parties equal treatment or the right to be heard in adversary proceedings;
> e) when the award is contrary to public policy.

At first sight, it can be said that these grounds differ substantially from those in the Concordat. In particular, the controversial provision that an award could be set aside for arbitrariness has disappeared.

The new Swiss law on international arbitration reflects the grounds for recourse against awards included in the UNCITRAL Model Law (Art. 34) and New York Convention (Art. 5).

An action to set aside may be brought before the Federal Tribunal (Art. 191(7)), or, if the parties have so agreed, before the court of the canton in which the arbitral tribunal has its seat (Art. 191(2)). The cantons shall designate a sole cantonal court having jurisdiction for this purpose, so

establishing a highly competent forum for arbitration matters.

If so far the new federal statute does not depart from the principles of the UNCITRAL Model Law, in Art. 192(1) is contained the real innovation:

> If neither party is domiciled nor has its habitual residence or place of business in Switzerland, the parties may expressly agree in the arbitration agreement or in a subsequent written agreement, to waive their right to challenge an arbitral award before the Swiss courts; they may also waive their right only with respect to one or some of the grounds set forth at Art. 190(2).

This provision allows foreign parties that choose to arbitrate in Switzerland to obtain an award not subject to any review by the courts of the place of arbitration.

It is a codification of the detachment phenomenon. As a matter of fact, such an award is treated even within Switzerland as a foreign one: according to Art. 192(2):

> When the parties have waived all recourse against the award and when its enforcement is sought in Switzerland, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply by analogy.

SWISS LEGISLATION AND UNCITRAL MODEL LAW

Switzerland is a most attractive venue for international commercial arbitration. Its historical neutrality, geographical position and commercial traditions are some of its advantages. Besides:

> . . . a group of outstanding international arbitrators has emerged in Switzerland, deserving of their reputation for neutrality and fairness, experienced in handling complex and sensitive cases, adroit in avoiding cultural clashes, and gifted linguistically.[329]

With the new Federal Statute on international arbitration, its attractiveness as place of arbitration is further increased.

Even the UNCITRAL Model Law looks out-of-date if compared with the Federal Statute.

In theory, the innovative power of Art. 192(1) is enormous. Arbitral awards are final and can be attacked only in the country where enforcement is sought. When that country is a party to the New York Convention (which is the rule), awards can be set aside only in one of the cases enumerated in Art. 5.[330]

It must be remembered that, in order to enter into an "exclusion agreement", both parties to arbitration must be foreigners having neither domicile nor habitual residence or place of business in Switzerland.

It will take some time to verify if international traders will choose to exercise the rights conferred by Art. 192(1). If they will choose to do so, the process of detachment of arbitral awards will become irreversible.

ENGLAND

"London has for many centuries been one of the major

centres of international commerce and so it is hardly surprising that the story of commercial arbitration in London has ancient origins."[331] The principal arbitration statutes in force in England are the Arbitration Acts of 1950, 1975 and 1979. They all continue to exist, covering different aspects of the arbitration process. However, they:

> . . . do not create a comprehensive and exhaustive system of arbitration law. . . . It is therefore necessary to refer to some of the more important decisions of the courts, not only on the interpretation of the arbitration Acts, but also on matters not covered by the legislation.[332]

A study of the English common law on international commercial arbitration thus becomes particularly difficult for commentators from a civil law country.

GENERAL PRINCIPLES

An arbitration is considered international if at least one of the parties is foreign or has its habitual place of residence in any state other than the United Kingdom (sec. 3(7) 1979 Act).[333] This approach is radically different from the French one or from the UNCITRAL Model Law (Art. 1(3)), whereas it is similar to the Swiss one. The arbitration agreement should be in writing (Sec. 32, 1950 Act), although, "an oral agreement to submit present or future differences to arbitration may be valid and enforceable at common law."[334] The arbitration agreement can be contained in an exchange of letters, telegrams, telexes and so on. It does not have to be signed by the

parties.

A public entity entering into an arbitration agreement cannot claim state immunity due to the provisions of the English State Immunity Act.[335]

The concept of separability of the arbitration clause has not been fully worked out by the English Courts. Disputes as to:

1) whether a contract containing an arbitration clause was ever concluded;

2) whether such a contract was void ab initio;

3) whether such a contract set out the true intention of the parties or should be rectified; fall outside the scope of an arbitration clause in the contract.[336]

However, an express provision of the parties can give the arbitral tribunal the power to decide upon the existence or validity of both the arbitration agreement and the contract in which it is included. Institutional arbitration agreements contain such a provision (ICC Rules, Art. 8(4), LCIA Rules, Art. 14(1)). In Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v. Ras Al Khaimah National Oil Co.,[337] Sir John Donaldson stressed that:

> . . . an arbitration agreement constitutes a self-contained contract collateral or ancillary to the substantive agreement . . . and . . . it need not be governed by the same law as that agreement.

And he concludes that, as the parties had decided to arbitrate under ICC Rules, their intention " . . . that the agreement to arbitrate shall be an independent and collateral

contract could not be more clearly indicated".[338]

English judges may, in certain cases, be appointed arbitrators, "A Judge of the Commercial Court may with the consent of the Lord Chief Justice accept appointment as a sole arbitrator when the dispute appears to be of a commercial character."[339]

APPLICABLE LAW

a) Rules of Procedure

Although several authors stress that "the arbitrator is master of procedure",[340] a distinction should be drawn between institutional and ad hoc arbitrations.

In institutional arbitrations, the arbitrator is indeed master of procedure, because the parties have given him the widest discretion in choosing the applicable rules of procedure (ICC Rules, Art. 11, LCIA Rules, Art. 5).

In ad hoc arbitrations, in the absence of an explicit provision of the parties, the judgment of the Court of Appeal in Chilton v. Saga Holidays[341] compels the arbitral tribunal to apply English rules of procedure.[342]

As stressed earlier, when choosing England as a place of arbitration, the parties should include a clause indicating that English rules of procedure do not apply.

Any lawyer coming from a civil-law country would be at a great disadvantage in a dispute to be determined under the adversarial procedure used in the common-law legal systems.

Besides, it should be emphasized once again that the continental inquisitorial procedure is often more effective than the adversarial system.[343]

Unfortunately, some perplexities arise about the availability of court interim measures in arbitrations conducted in accordance with foreign rules of procedure.[344]

b) Substantive Law

Arbitrations taking place in England must be decided in accordance with a national substantive law. This approach is totally different from the UNCITRAL Model Law and from the legislation of almost every other country.

As Steyn points out:

> English law requires all arbitrators to decide disputes in accordance with the rules of law governing the dispute, and the same principle applies where the contract contains an express choice of a foreign system of law as governing the transaction.[345]

The peculiarity of the English arbitration law that strikes one most is that, "the concept of arbitrators acting as amiables compositeurs or deciding disputes ex aequo et bono is not recognized in English law".[346]

Obviously, situations such as depecage, freezing of the law, application of international law, or lex mercatoria are alien to English arbitrations. It should be noticed that in Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd., Lord Denning said that the parties can, by express provision, authorize arbitrators to

depart from the strictness of the law. In particular, ruling on the validity of such an arbitration clause, he said:

> I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation.[347]

However, as Steyn pointed out in 1983, these dicta are inconsistent with decisions of high authority and cannot be accepted as correctly stating the law.[348] In spite of that, the attitude of English judges against awards rendered ex aequo et bono or applying principles of lex mercatoria is probably changing.[348]

In 1987, in Deutsche Schachtbau-und Tiefbohrgesellschaft mbh v. Ras Al Khaimah National Oil Co., Sir John Donaldson upheld Lord Denning's decision in the Eagle Star case and said:

> I can see no basis for concluding that the arbitrators' choice of proper law, a common denomination of principles underlying the laws of the various nations governing contractual relations, is outside the scope of the choice which the parties left to the arbitrators.[349]

ENGLISH LEGISLATION AND ARBITRAL AUTONOMY

> For almost a hundred years, prior to 1979, commercial arbitration in London had been subject to the so-called "special case" or "case stated" procedure, by which the High Court of Justice could force an arbitrator to submit a point of English law for judicial determination.[350]

This peculiarity of English arbitration law rendered England unsuitable for international commercial arbitration. As a

matter of fact, "the ICC Court of Arbitration eschewed London as place of arbitration."[351]

The Arbitration Act of 1979 abolished the "special case" procedure. However, it "did not repeal the High Court's statutory power to remit awards for reconsideration by the arbitrator and to set aside an award if the arbitrator has 'misconducted himself'."[352]

The change in English legislation was due to economic considerations:

> Lord Cullen of Ashborne ventured an estimate that a new arbitration law might attract to England as much as £500 million per year of "invisible exports", in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.[353]

However, "the 1979 Act does not go far enough."[354]

The system introduced by the Act is particularly complex. (It should be said that, in fact, it is complex enough to render any foreign lawyer skeptical about recommending to a client England as place of arbitration).

Unlike before, "awards are now final, and thus enforceable immediately, even if an appeal is later allowed."[355]

An appeal to the High Court:

> . . . may be made only with consent of the opposing party or with leave from the court, which will not be granted unless the determination of the legal question "could substantially affect the rights of one or more of the parties". The court has discretion to attach conditions to its leave to appeal, for instance, it may require security for enforement of the award. The High Court decision may be taken to the Court of Appeal only if the High Court has certified that there exists a

matter of "general public importance."[356]

> The High Court may order an arbitration to state the reasons for his decision if a party requests a reasoned award before the decision, or if there are "special reasons" (not defined by the Act) why such a request was not made. . . .
>
> A question of law existing during the proceedings can be referred to the Court for interlocutory clarification in a manner similar to the former "consultive case", but only if the arbitration or all parties agree, and the Court decides that the preliminary determination would result in "substantial saving in cost."[357]

It must be noted that these powers of intervention of the ordinary courts can be ousted by a so-called "exclusion agreement". However, exclusion agreements are forbidden if the arbitration relates, in whole or in part, to: a) a

> a) a question or claim falling within the Admiralty jurisdiction of the High Court, or
> b) a dispute arising out of a contract of insurance, or
> c) a dispute arising out of a commodity contract.[358] d

The subjection of these "special category" disputes to a different discipline was intended to "encourage the fertilization of English law by the commercial community through judicially reviewable arbitrations."[359]

It has been pointed out that, even after the 1979 Act, the High Court retains the power to, "remit the matters . . . to the reconsideration of the arbitrator" and "set the award aside" in case of misconduct (Sec. 22-23, 1950 Act). The term "misconduct" describes procedural errors and omissions.[360] Indeed, its interpretation is crucial.

As Park underlines, "the present state of English

arbitration law seems to leave the High Court with powers wide enough to justify almost any intervention in the arbitral process, despite an exclusion agreement".[361]

ENGLISH LEGISLATION AND UNCITRAL MODEL LAW

The relationship between English legislation and the UNCITRAL Model Law has been examined by Kerr.[362] His conclusions, however, are disputable. In particular, he affirms that no country, "can adopt the draft UNCITRAL Model Law in its present form without facing the same choice as England must face, of either changing its law or adapting the model."[363] This statement confirms what the author had previously said in the same article: "English lawyers know far less about (the powers of the Courts in other jurisdictions) than foreign lawyers know about the position under English law."[364] England must indeed face a choice: the principles lying behind its arbitration system are incompatible with the recent developments of international commercial arbitration, whereas other countries (in particular Italy and France had enacted "modern" arbitration laws before the UNCITRAL Model Law was drafted.

Even authors from common-law countries have joined in the chorus of complaints against the English legislation. Schmitthoff's suggestion is that:

> A future Arbitration Act should give effect to the following two principles. First, it should be provided that an agreement of the parties according to which the

> arbitration clause in a main contract shall be separate from and independent of the other clauses of that contract shall be valid, and there shall be a rebuttable presumption that the parties have so agreed. Secondly, it should be declared that by an exclusion agreement under the Arbitration Act 1979 the parties may exclude the application to the rule that the arbitrator has no power to determine his own jurisdiction, without prejudice to the right of either party to raise the plea of lack of impartiality on the part of the arbitrator where a deliberate abuse of that power can be established.[365]

According to Park:

> The healthy evolution of English arbitration might benefit from modification of the High Court's power to set aside awards on vague grounds such as arbitrator misconduct and its replacement with a power to deal with specific defects in the award's integrity. The English statute might be amended to give the High Court the power - notwithstanding an exclusion agreement - to hear challenges to an award for specifically enumerated procedural deficiencies that call into question the arbitrator's honesty, good faith, or respect for the limits of his authority.[366]

Then, the author "twists the knife": "The sceptered isle might borrow these standards from its Gallic neighbor".[367]

Chapter V

CONCLUSION

". . . L'Arbitrage international est devenu le mode habituel de solution des litiges du commerce international".[368]

This study has briefly described some aspects of modern international commercial arbitration.

Today a vast majority of international contracts contain an arbitration clause.

The importance of international commercial arbitration has been recognized by the United Nations[369] and it is confirmed by the growing number of states amending their arbitration laws in accordance with the emerging exigencies. New arbitral institutions are appearing on the international scene, and the administration of international arbitration has become a business itself. Arbitration is more and more a service offered by private specialized institutions, and every country has an economic interest in becoming an attractive place of arbitration.[370]

International arbitration is only a distant relative of domestic arbitration. The differences are overwhelming.

However, in too many countries this difference is not

yet recognized: the same rules govern domestic and international disputes.

The drafting by UNCITRAL of the Arbitration Rules of 1976 and the Model Law of 1985 is not only a significant achievement, but has also created an international debate on the various aspects of international commercial arbitration. International lawyers are today more aware of the arbitration laws of foreign countries due to the increasingly great number of publications in that field. The work of private organizations, such as the International Chamber of Commerce (ICC) and the International Council for Commercial Arbitration (ICCA) cannot be overlooked.

In particular, the ICCA (which was, in 1979, granted non-governmental consultative status by the United Nations),[371] has provided an extensive exploration of all aspects of international commercial arbitration.

Its Yearbook Commercial Arbitration (containing national reports which now cover almost all the countries and legal systems of the world, plus court decisions on the application and interpretation of the New York Convention of 1958),[372] keeps lawyers all around the world updated in this constantly evolving area. The analysis of the author has been limited by a simple factor, i.e., not being a practicing lawyer, it was impossible to give a detailed description of a phenomenon in which the author had never been involved. However, from the materials taken into consideration, the author has

developed some opinions.

1) The importance of the arbitration clause.

As a well drafted contract can prevent eventual disputes, a well drafted arbitration clause can eliminate delays in the solution of the dispute. It is essential to choose the right kind of arbitration. The increasing number of arbitral institutions is certainly a positive factor, however it gives a lawyer a wide choice of possible arbitration rules which might become confusing. Then, the choice of the place of arbitration (when it is not chosen by the institution itself), is still extremely important. An acceptable degree of harmonization has been reached, but relevant differences still exist among the national arbitration laws. If the parties decide to leave the choice of the arbitrator to the institution, it is clear that an arbitral institution should be chosen, not only for its rules or costs, but, much more importantly, for its arbitrators.

Ad hoc arbitrations (whether administered under UNCITRAL rules or not) are likely to lose importance in the international scene. Too many authors advise against the drafting of ad hoc arbitration clauses, and they are even too convincing.[373]

2) The choice of the applicable law.

The choice of the substantive law should not be left to the arbitrators. A pactum de lege utenda should be included

in the arbitration agreement.

In several cases, when the arbitrators have the power to choose the applicable law, or rules of law where allowed to do so, the solution of the dispute depends entirely on their choice. In some countries their choices will not be reviewed by any authority, and this lack of control in the place of arbitration renders their decisions unattackable, because in the place of enforcement, under the New York Convention, the award can be set aside only for the grounds of Art. 5, which do not include a review of the choice of law made by the arbitral tribunal (unless that choice violated a mandatory rule of the place of arbitration). It is superfluous to say that, if the parties want to have their dispute decided ex aequo et bono, they should avoid places of arbitration such as England, where their choice might lead to a setting aside of the award by the ordinary courts. The choice of lex mercatoria without any other reference to a national set of rules gives the arbitrators a wide freedom to establish what lex mercatoria is, rendering the solution of the dispute extremely unpredictable.

3) Public policy.

The discretion that national courts enjoy in refusing to enforce awards contrary to public policy "of that country"[374] might be used as a weapon against undesirable awards by corrupt or biased judges. If it has never happened in the past,[375] it might happen in the future. That is

why some authors have tried to define international public policy.

With the development of the "detachment phenomenon" and the possibility to enter into exclusion agreements, arbitral awards are likely to be more seriously scrutinized in the country where enforcement is sought and the violation of public policy defense might be raised by losing parties.

An attempt to draw international guidelines that national courts should respect in defining public policy would be useful, but it is most unlikely to succeed. The New York Convention expressly refers to public policy of the forum where enforcement is sought, and any attempt to define international public policy might be seen as an interference in the sovereignty of the state.

4) Detachment.

If it is probably correct to affirm that arbitration will remain bound by the mandatory rules of the country where it takes place, the new trend is to remove any (or most) of the power to appeal an award in that country. This seems to be the real meaning of detachment.

However, this debated phenomenon creates a potentially dangerous result: the courts of the place of enforcement might be required by the losing party to give a judgment on the conformity of the award with the mandatory rules of the place of arbitration.

This seems, at least theoretically, a possible source of

confusion. Exclusion agreements like those introduced by the new Swiss federal statute (English exclusion agreements are substantially different, because the award can still be set aside in the place of arbitration, for example in case of misconduct of the arbitral tribunal) are extremely positive. There seems to be no reason for a double control on the award in two different countries,[376] however that was the system adopted by the New York Convention of 1958. Today, 30 years after, the doctrine is inclined to reach a consensus on the fact that the system should be modified.

The setting aside of the award in the place of arbitration was never an insurmountable obstacle for its enforcement elsewhere.

However, decisions such as the one in the Gotaverken case are an exception in the scheme of the New York Convention. More often enforcement of awards set aside in the country was refused under Art. 5(1)(e).[377]

Switzerland will serve in the future as a test: exclusion agreements must be agreed upon by the parties; if international traders will stipulate such agreements without regretting their choice, other countries will probably enact legislation similar to the Swiss statute.

International commercial arbitration is a rapidly evolving area. What seemed advanced only two or three years ago, is considered conservative today. An example is the UNCITRAL Model Law. It should be remembered that the Model

Law was the result of a compromise between liberal and conservative positions, therefore reflecting principles generally accepted in the international community.

National legislators can use it as a guideline, apporting the modifications that they consider appropriate.

A good example is the Canadian province of Alberta, that enacted the Model Law as as whole, but modified Art. 28, which is one of the most conservative provisions. In Alberta, if the parties fail to designate the law applicable to the substance of the dispute, the arbitral tribunal "shall apply the rules of law it considers appropriate given all the circumstances respecting the dispute",[378] whereas Art. 28(2) of the UNCITRAL Model Law states that "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."[379]

The Model Law does not provide the possibility of entering into exclusion agreements, and thus does not adhere to the theories in favor of detachment.

Nevertheless, the enactment of arbitration laws in accordance with the Model Law is an important step toward harmonization.

"L' economie moderne ne pourrait pas etre envisagee sans l'arbitrage" (Frederic E. Klein).

The development of international commercial arbitration

is the consequence of the expansion of international trade and of the flagrant inadequacy[380] of the recourse to national ordinary courts.

Economic interdependence and collaboration can bring a peaceful future, in which an impartial and independent way to settle disputes such as arbitration can play a major role.

FOOTNOTES

[1]The importance of international commercial arbitration is stressed in the preamble of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 15th December, 1976: "The General Assembly, recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations. . . ."

In the UNCITRAL Model Law on International Commercial Arbitration, adopted on 21st June, 1985, there is an interesting definition of the term "commercial" (footnote no. 2): "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation, or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreements or concessions; joint ventures and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road" (UNCITRAL Model Law, reprinted in 11 ICCA Yearbook Commercial Arbitration (hereinafter Yearbook) (1986), p. 380. For an analysis of the UNICTRAL Model Law, see infra, p. 96.

[2]See Rene David, Arbitration in International Trade, (1985), p. 5. For a brief account of the history of international commercial arbitration, see Bernardini, L' Arbitrato Internazionale, (1987), pp. 9-12.

[3]I.e., France, Art. 1492. Nouveau Code de Procedure Civile (hereinafter N.C.P.C.).

[4]I.e., England, Sec. 1(4)(a,b) Arbitration Act 1975. According to the UNCITRAL Model Law (Art. 1(3)): "An arbitration is international if: a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or b) one of the following places is situated outside the State in which the parties have their places of business: 1) the place of arbitration if determined in, or pursuant to,

the arbitration agreement; 2) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."

[5]But the laws of some countries contain more restrictive provisions. For example, in Morocco the arbitration agreement must be handwritten by the parties. See Bernardini, op cit., n. 2, p. 56.

[6]Ronald Bernstein, Handbook of Arbitration Practice, (1987), p. 18.

[7]The division of arbitration agreements in three categories may seem unusual. Usually the doctrine distinguishes only between ad hoc and institutional agreements. However, due to its peculiarities, it seems more correct to consider agreements refering to UNCITRAL Arbitration Rules as a tertium genus. See infra, pp. 9-11. The UNCITRAL Arbitration Rules are reprinted in 2 Yearbook (1977), p. 161. Some legal systems draw a distinction between compromis and clause compromissoire: a compromis is an agreement made after a dispute has arisen, whereas a clause compromissoire is a clause, inserted in a contract, providing that if a dispute arose from such contract, it would be settled through arbitration. See David, op cit., n. 2, p. 47.

[8]Jan Paulsson in Bernstein, op cit., n. 6, p. 344.

[9]Id., p. 345 and Bernardini, op cit., n. 5, p. 66.

[10]See Paulsson in Bernstein, op cit., n. 6, p. 344.

[11]Many institutions, especially in Eastern Europe, are governmental. See L. Kos-Rabcewicz-Zubkowski, East European Rules on the Validity of International Commercial Arbitration Agreements, (1970).

[12]See Paulsson in Bernstein, op cit., n. 6, pp. 336-342 and W. Laurence Craig, William W. Park, Jan Paulsson, International Commercial Arbitration, International Chamber of Commerce Arbitration, (1984), vol. I, part 1, pp. 1-15.

[13]Bernardini, op cit., n. 2, p. 69.

[14]See id., p. 69 and Craig, Park, Paulsson, op cit., n. 12, vol. I, part 1, p. 1.

[15]Id., p. 1.

[16]Id., p. 1.

[17]Id., p. 12.

[18]Id., p. 29.

[19]See Paulsson in Bernstein, op cit., n. 6, p. 342.

[20]Id., p. 339. See also, in general on the LCIA, Bernardini, op cit., n. 5, p. 72 and L. Kos Rabcewicz-Zubkowski, Paul J. Davidson, Commercial Arbitration Institutions: An International Directory and Guide, (1986), pp. 66-67.

[21]Donald B. Straus, "Pieter Sanders and the UNCITRAL Rules" in The Art of Arbitration, Liber Amicorum Pieter Sanders, (1982), p. 301.

[22]Pieter Sanders, "Commentary on UNCITRAL Arbitration Rules" in 2 Yearbook, (1977), p. 173.

[23]Straus, op cit., n. 21, p. 301.

[24]Paulsson in Bernstein, op cit., n. 6, p. 345.

[25]Sanders, op cit., n. 22, p. 175.

[26]Id., p. 174.

[27]"The Permanent Court of Arbitration was established at The Hague by the First Peace Conference of 1899. The Conference for the pacific settlement of international disputes of 1907 revised the 1899 Convention and completed the work of the First Peace Conference. Today 72 states, from all parts of the world, have adhered to this Convention. The Permanent Court of Arbitration, contrary to what one would expect because of its nomenclature, is no real court. It consists of a List of Members prepared to function as arbitrators. The Court situated at the Peace Palace in The Hague, in the same building as the International Court of Justice, has at its disposal a Bureau headed by the Secretary General." Id., pp. 185-186.

[28]Id., p. 185. See also Paulsson in Bernstein, op cit., n. 6, p. 345.

[29]Id., p. 345.

[30]Sanders, op cit., n. 22, p. 219.

[31]International Chamber of Commerce (ICC) Standard Arbitration Clause.

[32]London Court of International Arbitration (LCIA) Standard Arbitration Clause.

[33]UNCITRAL Arbitration Clause.

[34]Park, "Arbitration of International Contract Disputes" in 39 Business Lawyer (1983-4), p. 1785.

[35]See Id., pp. 1786-1789.

[36]Bernstein, op cit., n. 6, p. 25.

[37]See Paulsson in Bernstein, op cit., n. 6, p. 345.

[38]It should be noted however, that Italian courts have enforced arbitration agreement designating an even number of arbitrators.

[39]Brazil, Peru, Venezuela according to Bernardini, op cit., n. 2, p. 129.

[40]Id., p. 76.

[41]David, op cit., n. 2, p. 282.

[42]Id., p. 282.

[43]Park, "The Influence of National Legal Systems on International Commercial Arbitration: Recent Developments in English Arbitration Law, in Resolving Transnational Disputes Through International Arbitration, (1982), p. 81.

[44]New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958. The New York Convention is examined infra, p. 71,

[45]David, op cit., n. 2, p. 281.

[46]Paulsson in Bernstein, op cit., n. 6, p. 352.

[47]Id., p. 353.

[48]Julian D.M. Lew, Applicable Law in International Commercial Arbitration, (1978), p. 81.

[49]I.C.C. Guide to Arbitration, (1983), p. 38.

[50]See, in general, Lew, op cit., n. 48.

[51]Niboyet, "La Theorie de l' Autonomie de la Volonte" in 16 Rec. des Cours, (1927), p. 5, reported in Lew, op cit., n. 48, p. 72.

[52]Lew, op cit., n. 48, p. 181.

[53]Carlo Croff, "The Applicable Law in an International Commercial Arbitration. Is it Still a Conflict of Laws Problem?" in 16 International Lawyer, (1982), p. 623. As it will be explained later on, lex mercatoria can be defined in two different ways:
a) Lex mercatoria is the set of usages of the trade generally accepted and respected by international traders;
b) Lex Mercatoria is constituted by usages of the trade and legal principles generally accepted and respected by international traders. See infra, pp. 48-49.

[54]David, op cit., n. 2, p. 339. The concept of amiable composition, which in international commercial arbitration is equivalent to decisions rendered in aequitas or ex aequo et bono, has been defined in different ways. Several definitions are reported within this work. See infra, pp. 44-47.

[55]See Bernardini, op cit., n. 2, pp. 114-115.

[56]J.C. Castel, A.L.C. de Mestral, W.C. Graham, International Business Transactions and Economic Relations, (1986), p. 774.

[57]In some cases the arbitrators have the power to change the terms of the contract, see Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 6, pp. 55-58.

[58]Park, op cit., n. 34, p. 1788.

[59]Paulsson in Bernstein, op cit., n. 6, p. 347.

[60]In fact, the arbitral award is subject to a double control, both in the place of arbitration and in the place of enforcement. This system has been recently criticized by the doctrine, and some authors are in favor of "detached" awards (i.e. not subject to appeal in the place ofarbitration). See infra, p. 87.

[61]See infra, pp. 94-95.

[62]Alberto Piergrossi, L'Arbitrato Commerciale Negli U.S.A. e i Suoi Rapporti con l' Ordinamento Italiano, (1974),

p. 121.

[63]David, op cit., n. 2, p. 192.

[64]For example the LCIA standard arbitration clause. See supra, p. 12.

[65]See Clive M. Schmitthoff, "The Jurisdiction of the Arbitrator", in op cit., n. 21, pp. 289-293.

[66]For example Italy, France and Switzerland. As far as England is concerned, it is interesting to note that Lord Diplock in Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd., recognized that an arbitration clause is " . . . a separate contract ancillary to the main contract". [1981] 2 WLR, p. 141 at 166.

[67]David, op cit., n. 2, p. 251.

[68]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 31.

[69]F. Eisemann in International Arbitration, Liber Amicorum Martin Domke, (1967), p. 85.

[70]David, op cit., n. 2, p. 254.

[71]See, for example, Art. 1452 N.C.P.C. (France): "L'arbitre qui suppose en sa personne une cause de recusation doit imformer les parties. . . ."

[72]Isaak I. Dore, Arbitration and Conciliation Under the UNCITRAL Rules, (1986), p. 52.

[73]Id., p. 54.

[74]Tullio Ascarelli, "Arbitration Under Italian Law" in International Yearbook on Civil and Commercial Arbitration, (1928), p. 82.

[75]David, op cit., n. 2, p. 274.

[76]Bernardini, op cit., n. 2, p. 98.

[77]David, op cit., n. 2, p. 284.

[78]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 60.

[79]F.A. Mann, "Lex Facit Arbitrum", in op cit., n. 69, p. 160.

[80]Riccardo Luzzatto, "International Commercial Arbitration and Law of States", in 157 Hague Academy of International Law Collected Courses, (1977), p. 50.

[81]Martin Domke, Domke on Commercial Arbitration, (1968), p. 16.

[82]See New York Convention of 1958, Art. 5(1)(a).

[83]David, op cit., n. 2, p. 174.

[84]See, in general, Karl-Heinz Bockstiegel, Arbitration and State Enterprises, (1984), Gerald Aksen, Robert B. von Mehren Cochairmen, International Arbitration Between Private Parties and Governments, (1982), and Hazel Fox, "States and the Undertaking to Arbitrate", in 37 International and Comparative Law Quarterly, (1988), p. 1.

[85]See David, op cit., n. 2, p. 176 and U.K. State Immunity Act 1978, c. 33, s. 3(1): "A State is not immune as respects proceedings relating to (a) a commercial transaction entered into by the State." See infra, note 335.

[86]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 2, p. 11.

[87]David, op cit., n. 2, p. 184.

[88]Ascarelli, op cit., n. 74, p. 80.

[89]Lambert Matray, "Arbitrage et Ordre Public Transnational", in op cit., n. 21, pp. 241, 251. For a discussion of ordre public see infra, p. 81

[90]David, op cit., n. 2, p. 293.

[91]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 70.

[92]David, op cit., n. 2, p. 292 and Luzzatto, op cit., n. 80, p. 50.

[93]See New York Convention of 1958, Art. 5(1)(d).

[94]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 71 and David, op cit., n. 2, p. 292.

[95]Bernstein, op cit., n. 6. pp. 50-55.

[96]Paulsson in Bernstein, id., p. 356.

[97]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 4, p. 13.

[98]David, op cit., n. 2, p. 307 and Bernardini, op cit., n. 5, p. 103.

[99]See supra, p. 22.

[100]Frederic-Edouard Klein, "The Law to be Applied by the Arbitrators to the Substance of the Dispute", in op cit., n. 21, p. 189.

[101]David, op cit., n. 2, p. 341. The resolution mentioned by David was in accordance with the principles of G. Balladore-Pallieri and especially Sauser-Hall, see Mann, op cit., n. 79; Klein, op cit., n. 100; Lew, op cit., n. 48, pp. 245-272; Jean Robert, "De la Regle de Conflit a la Regle Matarielle en Matiere d' Arbitrage International" in op cit., n. 21, p. 277; Berthold Goldman, "L'Arbitre, les conflits de Lois et la Lex Mercatoria", in Actes du 1er Colloque Sur l' Arbitrage Commercial International (Universite Laval), (1985), pp. 103-131.

[102]Craig, Park, Paulsson, op cit., n. 12, vol. 1, Part 3, p. 79.

[103]Croff, op cit., n. 53, p. 632.

[104]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 80.

[105]Bernardini, op cit., n. 2, p. 113.

[106]See Alan Redfern, Martin Hunter, International Commercial Arbitration, (1986), pp. 22-24. See also Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 2, p. 71 (note 15).

[107]Id., part 3, p. 94.

[108]Park, op cit., n. 34, p. 1787. The expressions "equitable principles" and "aequitas", should be considered equivalent. They correspond to equite in French and equita in Italian, but are not translated with the English word "equity" due to the special significance of "equity" in common-law countries; see Louis B. Sohn, "Arbitration of International Disputes Ex Aequo et Bono", in op cit., n. 69, p. 332 and Giorgio Bernini, "Domestic and International Arbitration in Italy after the Legislative Reform" in 5 Pace

Law Review, (1984-85), p. 545 (note 7).

[109]Sanders in U.I.A. Arbitrage International Commercial, (1956), p. 19.

[110]Robert M. Marx, "Amiable Compositeur", in 2 Arbitration Journal, (1947), p. 214.

[111]Ion I. Nestor, "L' Amiable Compositeur et l' Arbitrage Selon les Regles du Droit", in Arbitrage Commercial, Essays in memoriam Eugenio Minoli, (1974), p. 341.

[112]See Nabil, N. Antaki, "L' Amiable Composition", in op cit., n. 101, pp. 159-60.

[113]Ulreich Scheuner, "Decisions Ex Aequo Et Bono by International Courts and Arbitral Tribunals", in op cit., n. 69, p. 283. Scheuner draws a distinction between equity and decisions ex aequo et bono: "The difference between equity and a decision ex aequo et bono . . . lies in the attitude toward rules of law. The judge who refers to equity stays within the borders of existing law. The judge deciding ex aequo et bono wins a greater freedom which dispenses him to some extent from the legal order.
Apart from the fact that this distinction, made by O'Connell, was referring to equity and not aequitas, describing a situation existing in common-law countries, I do not think that when the parties to an arbitration agreement refer to the power to decide ex aequo et bono or in aequitas (and I would say in equity, because for some authors, perhaps from civil law countries, aequitas and equity have the same meaning, for example David, op cit., n. 2, p. 335) they have in mind any hypothetical distinction between the two concepts. Moreover, I do not know whether Scheuner considered amiable composition a decision in equity, ex aequo et bono or a tertium genus.

[114]Jerzy Jakubowski, "Reflections on the Philosophy of International Commercial Arbitration and Conciliation", in op cit., n. 21, p. 179.

[115]See Leslie C. Green, Law and Society, (1977), pp. 99-100: "Civilization is a relative term depending upon the ethos, beliefs, culture and background of the person using it, and that person's concept of the primitive condition is formed on exactly the same basis. According to Article 38 of the Statute of the International Court of Justice, one of the "sources" of international law consists of general principles of law recognized by civilized nations, although the court has never found it necessary to decide a

case on these alone. This inability is by no means surprising, for it would be well-nigh impossible to decide what consituted general principles of law, other than perhaps that unjustifiable homicide constitutes a punishable offence. Moreover, who is to decide which are the civilized nations? . . ."

[116]See Sohn, op cit., n. 21, p. 331 and Augusto Sinagra, L'Arbitrato Commerciale Internazionale nel Sistema del Cirdi ed i Suoi Recenti Sviluppi, (1984), p. 41.

[117]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 2, p. 71 and part 3, p. 97.

[118]Bernstein, op cit., n. 6, p. 22.

[119]See Luzzatto, op cit., n. 80, p. 64.

[120]See Julius Henry Cohen, Commercial Arbitration and the Law, (1918), p. 73.

[121]Id., p. 72.

[122]Id., p. 80.

[123]New situations had to be dealt with, for example, the Florentines in the twelfth and the Venetians about the thirteenth century invented the bill of exchange. In the fifteenth century the practice of insuring, having been introduced into England by the Lombards, became very general, id., p. 81. See also Castel, op cit., n. 56, p. 623.

[124]Goldman, op cit., n. 101, p. 124. See Ole Lando,"The Lex Mercatoria in International Commercial Arbitration", in 34 International and Comparative Law Quarterly, (1985), p. 747.

[125]Lew, op cit., n. 48, p. 437.

[126]Lando, op cit., n. 124, pp. 754-755. See also, Antoine Kassis, "L'arbitre Les Conflits de Lois et la Lex Mercatoria", in op cit., n. 101, p. 140.

[127]Goldman, op cit., n. 101, p. 124.

[128]See infra, p. 108.

[129]Corte di Cassazione, 8 Feb., 1982 in Rivista di Diritto Internazionale Private e Processuale (1982), p. 829. See Bernini, "Recent Legislation and International Unification of the Law of Arbitration", in op cit., n. 101,

p. 344 and Goldman, op cit., n. 101, p. 130.

[130]The decision is in French because it is taken from Goldman, id., p. 130.

[131]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 81.

[132]Id., p. 81.

[133]Id., p. 82.

[134]Id., p. 82.

[135]The same opinion is expressed by Lando. According to this author, "It is not possible to provide an exhaustive list of all the elements of the "law merchant"." However, he provides an amazingly complete list of the elements that, in his opinion, are part of the new lex mercatoria. They are: Public international law; uniform laws; the general principles of law; the rules of international organizations; custom and usages, standard form contract; reporting of arbitral awards. See Lando. op cit., n. 124, p. 747.

[136]Id., vol. 1, part 6, p. 13.

[137]Id., p. 14.

[138]Id., p. 14 and vol. 1, part 3, p. 84, 7 Yearbook, (1982), p. 312, 8 Yearbook, (1983), p. 365.

[139]The text is excerpted from the above mentioned.

[140]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 84.

[141]Id., pp. 84-85.

[142]See 8 Yearbook, (1983), p. 365.

[143]Tudor Popescu, "L'Arbitre les Conflits de Lois et la Lex Mercatoria, in op cit., n. 101, p. 149.

[144]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 4, p. 1.

[145]See id., pp. 3-5.

[146]See supra, pp. 41-42. See also Jean Robert, Administration of evidence in I.C.A. in 1 Yearbook, (1976),

pp. 221-226.

[147]Domke, op cit., n. 81, p. 235.

[148][1986] 1 All E.R., p. 841.

[149]M.J. Mustill, S.C. Boyd, Commercial Arbitration, (1982), p. 310.

[150]See David, op cit., n. 2, p. 290.

[151]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 4, p. 10.

[152]Robert, op cit., n. 146, pp. 223-226, as summarized in Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 4, p. 10.

[153]Jaques Buhart, "Attachments and other Interim Court Remedies in Support of Arbitration", in 12 International Business Lawyer, (1984), p. 107.

[154]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 4, p. 32.

[155]Id., p. 39.

[156]Id., p. 41.

[157]Giovanni M. Ughi, "Attachments and other Interim Court Remedies in Support of Arbitration" in 12 International Business Lawyer, (1984), p. 116.

[158]Buhart, op cit., n. 153, p. 108.

[159]H.U. Freimuller, id., (Switzerland), p. 120.

[160]"The (Mareva) injunction takes the form of an order restraining the defendant, by himself, his servants or agents, from selling, disposing of or otherwise dealing with such moneys or chattels or from removing them out of the jurisdiction, usually until further order. Its purpose is to ensure that, if the plaintiff succeeds in the action, there will be property of the defendant available here out of which the judgment which the plaintiff obtains in it can be satisfied". See Charles N. Brower, W. Michael Tupman, "Court Ordered Provisional Measures under the New York Convention" in 80 American Journal of International Law, (1986), p. 36, note 92. Mareva injunctions, which are available in the civil-law countries since immemorial time (i.e. sequestri conservativi e giudiziari in Italy), have

been recognized by English judges only in 1975. (Lord Denning in Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All E.R., p. 282).

[161]Ughi, op cit., n. 157, p. 116.

[162]See Craig, Park and Paulsson, op cit., n. 12, vol. 1, part 4, p. 46. and especially note 20: "Mustill and Boyd express the view that a Mareva injunction cannot be obtained in England pending arbitration abroad, and that it could be made available for such proceedings only by Act of Parliament".

[163]See id., p. 43.

[164]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 105.

[165]For example, Italy, Art. 823 C.P.C.

[166]For example, Switzerland, Art. 33 Concordat.

[167]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 105. See also Bernstein, op cit., n. 7, p. 128.

[168]Id., p. 107.

[169]Sanders, "Commentary on UNCITRAL Arbitration Rules" in 2 Yearbook, (1977), p. 208.

[170]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 104.

[171]David, op cit., n. 2, p. 315.

[172]Italy, Switzerland.

[173]Bernardini, op cit., n. 2, p. 129.

[174]Paulsson in Bernstein, op cit., n. 6, p. 345.

[175]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 3, p. 109.

[176]Id., p. 110.

[177]van den Berg, The New York Arbitration Convention of 1958, (1981), p. 1, on the New York Convention, see, in general, Luzzatto, op cit., n. 80, pp. 66-86.

[178]See 12 Yearbook, (1987), pp. 407-408.

[179]David, op cit., n. 2, p. 145.

[180]See van den Berg, "Should an International Arbitrator Apply the New York Arbitration Convention of 1958? in op cit., n. 21, p. 39. According to van den Berg, ". . . on a Sunday afternoon, Pieter Sanders sat with a typewriter on his knees in the backyard of his father-in-law's house just outside New York. In that afternoon he managed to draft a . . . text, the major part of which was adopted in the second week of the Conference and thus became the New York Convention."

[181]See van den Berg, op cit., n. 177, p. 12.

[182]Id, pp. 17-18.

[183]Id, pp. 51-54. As Van den Berg underlines: "The use of the first reservation has less and less impact on the applicability of the New York Convention because of the increase in the number of contracting states". Id., p. 13.

[184]van den Berg, op cit., n. 177, p. 276. See also K.W. Patchett, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Explanatory Documentation Prepared for Commonwealth Jurisdictions), (1981), p. 22.

[185]See supra, pp. 38-39.

[186]van den Berg, op cit., n. 177, p. 278. ("So far" means before 1981).

[187]J.D. Bredin, "La Convention de New York du 1o Juin 1958 pour la reconnaissance et l' éxécution des sentences arbitrales étrangères" in 87 Journal du Droit International, (1960), pp. 1003-1020, (reported in van den Berg), id, p. 282.

[188]Bernstein, op cit., n. 6, p. 57.

[189]Patchett, op cit., n. 184, p. 23.

[190]vam den Berg, op cit., n. 177, p. 298.

[191]Patchett, op cit., n. 184, p. 23.

[192]van den Berg, op cit., n. 177, pp. 311-312.

[193]Id., p. 313.

[194]Id., p. 312.

[195]Id., p. 322.

[196]Id., pp. 324-325.

[197]According to van den Berg, ". . . the action for setting aside in the country of origin appears to be (uncommon) and rarely successful", see id., p. 326.

[198]Id., p. 342.

[199]Patchett, op cit., n. 184, pp. 24-25.

[200]van den Berg, op cit., n. 177, p. 341.

[201]Id., p. 350.

[202]Patchett, op cit., n. 184, p. 25.

[203]van den Berg, op cit., n. 177, p. 369. In Italy, for example, labour law disputes are considered non-arbitrable.

[204]See supra, p. 40. The expressions ordre public and public policy are considered as equivalent, although some authors consider them as different. See van den Berg, op cit., n. 177, p. 359.

[205]Lew, op cit., n. 48, p. 531.

[206]van den Berg, op cit., n. 177, p. 360.

[207]Lew, op cit., n. 48, p. 532.

[208]Id., p. 533.

[209]In Nepal, for example, the only Hindu Kingdom in the world, for the killing of a cow, a person can be sentenced to prison for life. This is immoral for any citizen of a western country, but it is perfectly accepted by Nepalese people: for them it is immoral to kill a cow.

[210]Green, op cit., n. 115, pp. 6-7.

[211]The prohibition of gambling is perhaps an example.

[212]Matray, op cit., n. 89, p. 241.

[213]van den Berg, op cit., n. 177, p. 360.

[214]Matray, op cit., n. 89, p. 242.

[215]Id., p. 243.

[216]van den Berg, op cit., n. 177, p. 360.

[217]Matray, op cit., n. 89, p. 246.

[218]The meaning of "the province of all mankind" is far from clear, however, it is indisputable that something labeled as such should not be used for war purposes.See "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967" (in particular Art. 1), reprinted in Carl Q. Christol, The Modern International Law of Outer Space, (1982), p. 851.

[219]Matray, op cit., n. 89, pp. 248-249.

[220]Patchett, op cit., n. 184, p. 26.

[221]van den Berg, op cit., n. 177, p. 362.

[222]December 23, 1974 - 508 Federal Reporter Second Series, p. 969, p. 969, reported id, p. 363. The leading case in the United States is the Supreme Court decision in Fritz Scherk v. Alberto-Culver Co., (June 17, 1974 - 417 U.S. Supreme Court Reports, p. 506.

[223]Cour de Justice (1st section) of the Canton Geneva, September 17, 1976 (Switz. no. 6), reported id., p. 365.

[224]van den Berg analyzes two special situations falling under the provision of Art. 5(2)(b): lack of impartiality of arbitrators and lack of reasons in the award. Of the two issues, the latter is particularly interesting: " . . . Whilst making the distinction between domestic and international public policy, the courts of the countries under whose law the giving of reasons is mandatory generally enforce awards without reasons made in countries where such awards are valid." See, for example, Bobbie Brooks Inc. v. Lanificio Walter Banci S.A.S. (Corte di Appello of Florence, October 8, 1977 - Italy no. 29) reported id., p. 381.

[225]Luzzatto, op cit., n. 80, p. 66.

[226]Id., p. 68.

[227]New York Convention, Art. 5(1)(e).

[228]Paulsson, "Arbitration Unbound: Award Detached

from the Law of its Country of Origin" in 30 International and Comparative Law Quarterly, (1981), p. 358.

[229]Id., pp. 364-365. An amazingly complete documentation on the Gotaverken dispute is reprinted in Gillis J. Wetter, The International Arbitral Process, (1979),vol. 2, pp. 179-230.

[230]Id., p. 367.

[231]Id., p. 365.

[232]I.C.C. Rules, Art. 24.

[233]See UNCITRAL Model Law, Art. 34.

[234]Derains, "France as a Place for International Arbitration, in op cit., n. 21, p. 117.

[235]See van den Berg, op cit., n. 177, p. 31.

[236]Derains, op cit., n. 234, p. 118.

[237]Paulsson in Bernstein, op cit., n. 6, p. 367.

[238]Park, "The Lex Loci Arbitri and International Arbitration" in 32 International and Comparative Law Quarterly, (1983), p. 25 (note 22).

[239]Id., p. 26.

[240]Paulsson in Bernstein, op cit., n. 6, pp. 372-373.

[241]See Mauro Ferrante, "About the Nature (National or A-national, Contractual or Jurisdictional) of I.C.C. Awards under the New York Convention" in op cit., n. 21, p,. 132 (note 6).

[242]At this point, why should national legal systems promulgate laws on international commercial arbitration? If international commercial arbitration is not subject to any control by the authorities of the place where it takes place, all the national provisions (except those dealing with enforcement) are meaningless.

[243]See Wetter, op cit., n. 229, vol. 2, p. 72.

[244]See Lew, op cit., n. 48, pp. 52-54.

[245]In fact the New York Convention tries to

compromise between territorial principle and doctrine of autonomy.

[246]van den Berg, op cit., n. 177, p. 34. See also Luzzatto, op cit., n. 80, pp. 70-71.

[247]It should be remembered that "under the New Convention . . . recognition and enforcement shall be granted unless the party opposing it proves that the award has not yet become binding upon the parties." See Ferrante op cit., n. 241, p. 136.

[248]Park, op cit., n. 238, p. 27, and Paulsson in Bernstein, op cit., n. 6, p. 352: "In SEEE v. Yugoslavia, the Court of Appeal of Rouen held an award rendered in Lausanne to be enforceable in France although the Swiss courts had refused to register it (which would have been necessary for enforcement in Switzerland)." However this is not a good example, because the Swiss courts did not set aside the award. They refused to register it.

[249]Paulsson, op cit., n. 228, p. 384.

[250]On the European Convention on International Commercial Arbitration, Geneva, April 21, 1961, see Bernardini, op cit., n. 5, p. 225.

[251]Park, op cit., n. 238, pp. 27-28.

[252]Paulsson, op cit., n. 228, p. 384.

[253]This would not be possible if the theory of detachment, with its implications of excluding any control on the arbitration process by the authorities of the place of arbitration, prevailed.

[254]van den Berg, "Introductory note on the UNCITRAL Model Law on International Commercial Arbitration", in 11 Yearbook (1986), 379. The works of the I.C.C.A. Interim Meeting in Lausanne in May 1984 are collected in I.C.C.A. Congress Series No. 2, UNCITRAL's Project for a Model Law on International Commercial Arbitration, (1984).

[255]Id., p. 379.

[256]Id., p. 379.

[257]Resolution 40/72 adopted by the General Assembly of the United Nations.

[258]The Model Law has been enacted in several Canadian provinces, including Alberta. See infra, p. 139. The Model Law has also been utilized by the Canadian federal government for arbitrations within its jurisdiction. See the Commercial Arbitration Act, S.C. 1986, c. 22.

[259]Italy, France, Switzerland and England.

[260]See infra, p. 118.

[261]See infra, p. 122.

[262]Bernini, "Recent Legislations and International Unification of the Law on Arbitration" in op cit., n. 101, p. 326.

[263]Bernini, op cit., n. 108, p. 544.

[264]See, among others, Sanders, "Consolidated Commentary, Vols. 3 and 4" in 4 Yearbook, (1979), p. 233 and van den Berg, op cit., n. 177, pp. 44-49. However this approach was never accepted by Italian authors, for example, Luzzatto, "Accordi Internazionali e Diritto Interno in Materia di Arbitrato: Convenzione di New York" in Rivista Diritto Internazionale Privato e Processuale, (1968), p. 37, Bernini, "Observations regarding recognition and enforcement of foreign arbitral awards in Italy" in Arbitrage Commercial, (1974), pp. 39-55, Recchia, "An Italian Approach to International Conventions on Arbitration" in id, 396, Minoli, "L'Italie et la Convention de New York pour la Reconnaissance et l'execution des sentences arbitrales etrangeres" in op cit., n. 69, 199, Bernini, "The Enforcement of Foreign Arbitral Awards by National Judiciaries: a Trial of the New York Convention's Ambit and Workability" in op cit., n. 21, p. 5.

[265]Bernini, op cit., n. 263, p. 554. See also Judgement of Sept. 18, 1978, Court of Cassation, no. 4167, reprinted in 4 Yearbook, 1979, p. 296.

[266]David, op cit., n. 2, p. 93.

[267]See id., p. 97: "It is however beyond doubt that arbitrato libero (irrituale) has been so far the most common type of arbitration used in Italy."

[268]Id., p. 97.

[269]Text as translated and reprinted in 9 Yearbook, (1984), pp. 309-315.

[270]Bernini, op cit., n. 263, p. 550.

[271]Id., p. 551.

[272]Id., p. 552.

[273]Id., p. 552.

[274]Id., p. 555.

[275]See id., p. 545 (note 7).

[276]Reprinted in 9 Yearbook, (1984), p. 418 (Fratelli Damiano S.N.C. v. August Tropfer & Co).

[277]Bernini, op cit., n. 263, p. 555.

[278]See Yves Derains, "National Reports, France" in 7 Yearbook, (1982), p. 3.

[279]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, pp. 39-40.

[280]Bernard Audit, "A National Codification of International Commercial Arbitration: the French Decree of May 12, 1981" in op cit., n. 43, p. 120.

[281]The English translation of the N.C.P.C. is taken from Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, pp. 49-63.

[282]"This Convention shall apply: a) to arbitration agreements concluded for the purpose of settling or disputes arising from international trade between physical legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States". Geneva Convention of 1961, Art. 1(a).

[283]The New York Convention does not define when arbitrations should be considered as international. Derains, in his comment on the French legislation, states that the French approach in defining international arbitration "is well-known since it is close to that of the European Convention". In fact, the approach is completely different: the French definition uses an objective criterion, while the Geneva Convention uses a subjective one. See Derains, op cit., n. 278, p. 5.

[284]Berthold Goldman, "La nouvelle réglementation française de l'arbitrage international" in op cit., n. 21,

p. 155.

[285]Derains, op cit., n. 278, p. 5.

[286]See id., p. 8.

[287]See supra, p. 52.

[288]For more details about trade usages, see supra, pp. 53-54.

[289]See Derains, op cit., n. 278, p. 12.

[290]Audit, op cit., n. 280, p. 140.

[291]Derains, op cit., n. 278, p. 13.

[292]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 47.

[293]Id., pp. 46-47.

[294]See supra, p. 108. Derains, op cit., n. 278, p. 11, Audit, op cit., n. 280. p. 131, and Bernardini, op cit., n. 5, p. 33.

[295]See supra, p. 75.

[296]Goldman, op cit., n. 101, pp. 173-174.

[297]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 40.

[298]Id., p. 40. See also Derains, op cit., n. 278, p. 119.

[299]Michael Rowe, "Arbitration: Getting the Best Deal" in International Financial Law Review, (1988-March), p. 27.

[300]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 77.

[301]See Charles Poncet, Emmanuel Gaillard, "Switzerland: Statute on International Arbitration (December 18, 1987), Introductory Note" in 27 International Legal Materials, (1988), p. 38.

[302]The text of the Concordat is reprinted (in Italian) in Bernardini, op cit., n. 2, pp. 202-209.

[303]M. Blessing, "Canton of Zurich Joins Concordat,

1 July 1985" in 11 Yearbook, (1986), p. 378. For a brief story of the Concordat, see Robert Briner, "National Reports, Switzerland" in 3 Yearbook, (1978), p. 181.

[304]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 78.

[305]Translation taken from id., p. 80.

[306]Id., p. 80.

[307]For a definition of compromis and clause compromissoire see supra, note 7.

[308]See Briner, "National Reports, Switzerland, in 9 Yearbook, (1984), p. 57.

[309]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 80.

[310]See supra, pp. 27-28.

[311]Id., p. 81.

[312]See the opinion of Pierre Lalive reported in Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 90.

[313]Id., p. 90.

[314]See the comments concerning decisions ex aequo et bono and lex mercatoria, supra, p. 44.

[315]Id., p. 83.

[316]Id., p. 83.

[317]Id., p. 83.

[318]Id., p. 83.

[319]Id., pp. 83-84.

[320]Id., p. 84.

[321]Id., p. 84.

[322]Id., p. 102 (note 179).

[323]Reprinted in 27 International Legal Materials, (1988), p. 44.

[324]Poncet and Gaillard, op cit., n. 301, p. 37.

[325]On the contrary, it is similar to the English Criterion: see infra, p. 124.

[326]Poncet and Gaillard, op cit., n. 301, p. 45 (note 1).

[327]Id., p. 39.

[328]Id., p. 40.

[329]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 78.

[330]See supra, pp. 74-75. However, ground (e) virtually disappears, due to the fact that a Swiss award is considered binding after its communication (Art. 190(1) Federal Statute).

[331]John Steyn, "National Reports, England" in 8 Yearbook, (1983), p. 3.

[332]Id., p. 4. "For example, there are only a few statutory provisions on the powers on arbitrators and none whatsoever on the way in which a reference should be conducted."

[333]See p. 121.

[334]Bernstein, op cit., n. 6, p. 17. See also Steyn, op cit., n. 331, p. 8.

[335]See State Immunity Act, 1978, Chapter 33, sec. 9: "Where a State has agreed in writing to submit a dispute which has arisen, or may arise to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration." See Steyn, op cit., n. 331, p. 10, and supra, notes 84 and 85.

[336]Steyn, op cit., n. 331, p. 11.

[337][1987] 2 All. E.R., p. 769.

[338]Id., at 774.

[339]Steyn, op cit., n. 331, pp. 13-14.

[340]See Bernstein, op cit., n. 6, p. 39, Steyn, op cit., n. 331, p. 18, and Redfern, Hunter, op cit., n. 205, p. 223.

[341][1986] 1 All. E.R., p. 841.

[342]See Bernstein, op cit., n. 6, p. 41, and Steyn, op cit., n. 331, p. 18.

[343]See supra, p. 41-42, Steyn, op cit., n. 331, p. 19 and Bernstein, op cit., n. 6, p. 41.

[344]See supra, p. 64.

[345]Steyn, op cit., n. 331, pp. 24-25.

[346]Id., p. 25.

[347][1978] 1 Lloyd's Rep., p. 357 at 362, (Court of Appeal).

[348]Steyn, op cit., n. 331, p. 25.

[349][1987] 2 All. E.R., p. 769, at 779 (Court of Appeal).

[350]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 20. (See sec. 21, 1950 Act).

[351]Id., p. 19.

[352]Park, op cit., n. 43, pp. 110-111.

[353]Id., p. 97. Lord Lloyd of Kilgerran noted that, "the main object of this Bill is to attract arbitration to London", id., p. 98.

[354]Clive M. Schmitthoff, op cit., n. 65, p. 293. The complexity of the English legal system is stressed by David: "With the 1979 Arbitration Act, the technicians of the English legislative style have reached one of the summits of their poisonous skill". The same opinion is shared by Lalive (who reports David's comments). See Lalive "Enforcing Awards" in ICC Court of Arbitration 60th Anniversary; a Look at the Future; (1983), p. 336 and p. 356, note 32.

[355]Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 25.

[356]Id., p. 26. See Arbitration Act 1979, Chapter 42, Sec. 1.

[357]Id., p. 26. See Sec. 2.

[358]Sec. 4(1). A "commodity contract" is defined in

Sec. 4(2).

[359]Park, op cit., n. 43, p. 106.

[360]See Craig, Park, Paulsson, op cit., n. 12, vol. 1, part 5, p. 24.

[361]Park, op cit., n. 43, p. 115.

[362]Sir Michael Kerr, "Arbitration and the Courts: the UNCITRAL Model Law" in 34 International and Comparative Law Quarterly, (1985), p. 1.

[363]Id., p. 12.

[364]Id., p. 11. Lalive states that: "L'appartenance a un grand systeme juridique, comme celui de la common law, rend peut-etre plus difficiles ce necessaire relativisme et cette approche "comparatiste" (pour ne pas dire supranationale) qu' appelle l' arbitrage international". Lalive, "L' Importance de l' Arbitrage Commercial International" in op cit., n. 101, p. 22.

[365]Schmitthoff, op cit., n. 65, p. 293.

[366]Park, op cit., n. 43, p. 115.

[367]Id., p. 115.

[368]Pierre Lalive, op cit., n. 364, p. 16.

[369]See supra, note 1.

[370]As Park points out, "Commercial as well as legal concerns motivated (the English reform)". The same considerations are certainly true for other countries. See Park, op cit., n. 43, pp. 97-99.

[371]See Howard M. Holtzmann, "Introduction - Recent Contributions of Pieter Sanders to the Art of International Commercial Arbitration" in op cit., n. 21, p. xiv.

[372]Id., p. xiii.

[373]See supra, p. 4 and note 9.

[374]New York Convention, Art. 5(2)(b). See supra, p. 75.

[375]van den Berg reports 5 cases: " . . . although the public policy provisions are frequently invoked, out of some 140 decisions, enforcement of an arbitration agreement

and an arbitral award was refused in five decisions only on account of public policy". See van den Berg, op cit., n. 177, pp. 366-367.

[376]See Bernini, op cit., n. 262, p. 347.

[377]See supra, p. 74.

[378]International Commercial Arbitration Act, S.A. 1986, Chapter 1-66, s. 7.

[379]See supra, p. 21.

[380]See the opinions of David and Popescu reported in Lalive, op cit., n. 368, p. 24.

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